IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1913.

WILMINGTON TRANSPORTATION COMPANY, a Corporation,
Plaintiff in Error,
vs.
RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Defendant in Error.

Docket 24062.
No. [redacted].
369

MOTION TO ADVANCE CAUSE.

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MOTION TO ADVANCE CAUSE.

Both parties hereby join in moving this Honorable Court to advance this cause for hearing as near the beginning of the October Term of 1914 as may be convenient. In support of this motion we shall set forth briefly the facts of this case, the general public interest therein and the importance of an early decision.

FACTS.

Wilmington Transportation Company operates a line of steam vessels duly licensed, inspected and enrolled as coasting vessels under the several acts of Congress, and is engaged in carrying freight and passengers over a direct route between San Pedro, in Los Angeles County, California, and Avalon, Catalina

Island, in Los Angeles County, California. The distance between these points is approximately 27 miles, 21 miles of which are on the high seas.

The Railroad Commission of the State of California is authorized by Sections 22 and 23 of Article XII of the Constitution of California to exercise such powers of supervision and regulation over common carriers and other public utilities as may be conferred upon it by the Legislature. In the Public Utilities Act, Statutes 1911, Extra Session, page 18, the Legislature gave to the Railroad Commission wide powers of supervision and regulation over the rates, service and finances of common carriers and other public utilities. The term "common carrier" is defined in subdivision *1* of Section 2 of the Public Utilities Act as follows:

> "(1) The term 'common carrier,' when used in this act, includes every railroad corporation * * * ; and every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing *any vessel regularly engaged in the transportation of persons or property for compensation upon the waters of this state or upon the high seas, over regular routes between points within this state.*"

The present case arose upon formal complaint filed with the Railroad Commission by a firm of merchants doing business in Avalon, Catalina Island. The complainants alleged that the rates charged by Wilmington Transportation Company for the transportation of persons and property between San Pedro and

Avalon are unjust and unreasonable, and asked the Commission to fix just and reasonable rates.

Wilmington Transportation Company moved that the complaint be dismissed on the ground that the Railroad Commission had no jurisdiction over the subject matter thereof. This contention rests on the fact that in plying between San Pedro and Avalon the vessels of Wilmington Transportation Company are required to traverse the high seas. The Company took the position that since its vessels traverse the high seas they are engaged in commerce with foreign nations, jurisdiction over which is vested in the Congress of the United States under Section 8 of Article I of the Federal Constitution, providing that Congress shall have power:

> "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

After argument on the question of jurisdiction, the Commission denied the motion to dismiss, and directed the defendant to answer.

Wilmington Transportation Company then obtained from the Supreme Court of the State of California a writ of *certiorari* to review the order of the Railroad Commission denying the motion to dismiss. The Supreme Court on December 29, 1913, rendered its decision in the case of *Wilmington Transportation Co.* vs. *Railroad Commission of the State of California,* affirming the order of the Railroad Commission. From this decision the Wilmington Transportation Company has sued out the present writ of

error from this Honorable Court to the Supreme Court of California.

QUESTION.

The only question in this case is whether, under the Federal Constitution, the State of California can regulate the rates charged for transportation of persons or property between two points within the State, when the transportation is conducted by vessels which, while plying regularly in a direct route between these points, traverse throughout a portion of their journey the high seas.

GENERAL PUBLIC INTEREST IN THIS CASE.

We most earnestly urge the importance of an early decision upon the question presented in this case. Wilmington Transportation Company is but one of a large number of companies operating vessels engaged in carrying freight and passengers between points of origin and points of destination within the State of California, the direct route between which is in part upon the high seas. Until the present question is decided by this Honorable Court these transportation companies do not know whether they should file their rates with the Railroad Commission and in other respects comply with the provisions of the Public Utilities Act defining the jurisdiction of the Railroad Commission.

The traveling and shipping public are uncertain whether the Railroad Commission can investigate the

reasonableness of the rates charged by these transportation companies. Numerous complaints by members of the public against these companies are necessarily being held in abeyance by the Railroad Commission until this case is decided.

The Railroad Commission, to whom the State of California has entrusted the work of regulating and supervising common carriers and other public utilities, is desirous of asserting that jurisdiction and justly exercising the same so far as it may lawfully do so, and of refraining from asserting jurisdiction over those utilities which are not under its control. If the Railroad Commission has jurisdiction over these transportation companies, it is the Commission's duty to assert that jurisdiction. Until the present case is decided, the Railroad Commission is seriously embarrassed and is uncertain how to proceed with reference to these transportation companies.

The question at issue is of great moment to the State of California; and likewise affects other coast states of this Union. By reason of the great public importance of this case, we respectfully join in asking that it be advanced for hearing.

Respectfully submitted,

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Attorney for Plaintiff in Error,

MAX THELEN,
DOUGLAS BROOKMAN,
ALLAN P. MATTHEW,
Attorneys for Defendant in Error.

Dated at San Francisco, this 6th day of June, 1914.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1914.

No. 369.

Wilmington Transportation Company,

Plaintiff in Error,

vs.

Railroad Commission of California,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

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*NOTE: The guide lines printed in this style of type, both in this index and in the body of the brief, are intended as a topical index (although not alphabetically arranged), rather than as a logical analysis of the argument.

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No. 369.

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vs.
Railroad Commission of California,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

FIRST.

STATEMENT OF THE CASE.

This cause arises out of an attempt on the part of the Railroad Commission of the state of California, the defendant in error, to entertain a proceeding to fix the rates and charges of plaintiff in error for transportation of passengers and freight between the Port of Los Angeles (formerly designated "San Pedro") and the town of Avalon, situated on the island

of Santa Catalina, which lies off the coast of California, in the waters of the Pacific ocean. The distance between the two ports is some twenty-seven miles [Record, fol. 27], so that upwards of twenty miles of the journey in each direction is necessarily upon the high seas, outside the territorial jurisdiction of the state. [Record, fol. 3.]

It appears from the opinion rendered by the Railroad Commission, upon the proceedings hereinafter referred to, that it was stipulated before the Commission that all vessels employed by the company in its transportation between San Pedro and Avalon are enrolled and licensed to carry on a coasting trade under the acts of congress. [Record, fol. 35.]

The proceedings before the Railroad Commission were initiated by a "complaint" filed on behalf of certain shippers of merchandise on company's vessels, and it prayed that the Commission "adjust the rates charged by the said Wilmington Transportation Company for the transportation of passengers or goods, freight or cargo, and that it reduce said rates to a just and reasonable basis." [Record, fols. 7-10.]

A motion to dismiss the proceedings before the Commission was made on behalf of the company [Record, fol. 32] on the ground that the Commission had no jurisdiction of the commerce or transportation in question, which motion was

denied and the company ordered to satisfy or answer the complaint. [Record, fol. 12.] The company thereupon filed a formal petition for rehearing before the Commission, setting forth more specifically the grounds on which it claimed a want of jurisdiction, being, in brief, that the transportation here involved constituted commerce subject exclusively to regulation by congress under the commerce clause of the federal constitution; and that any provisions of the constitution or laws of the state attempting to confer jurisdiction upon the Commission to regulate such transportation were void. [Record, p. 8.]

A rehearing being denied by the Commission [Record, p. 9], the company filed a petition for a writ of review or *certiorari* in the Supreme Court of the state [Record, p. 1 *et seq.*] in accordance with the provisions of section 67 of the governing statute [referred to in the Record herein, fols. 37, 38], basing its claim to the writ upon the same jurisdictional grounds above indicated.

After hearing upon the writ of *certiorari*, to which the Commission had made return, setting forth the proceedings in full, the Supreme Court of the state rendered its decision and judgment confirming the order of the Railroad Commission [Record, fols. 65-74]; from which judgment this writ of error is prosecuted.

The ground on which the state Supreme Court

denied relief against the order of the Railroad Commission, as appears from its decision just referred to, was that the transportation in question was not of the character committed to regulation by congress under the commerce clause. [Record, fol. 74.]

It will thus appear that the single question presented by the record for decision by this court, is whether the provisions of the constitution and laws of the state of California, construed as conferring upon the Railroad Commission of the state jurisdiction to regulate the transportation carried on by the plaintiff in error, over the high seas, are in conflict with section 8 of article 1 of the Constitution of the United States conferring upon congress the power to regulate interstate and foreign commerce.

SECOND.

SPECIFICATION OF ERRORS RELIED ON.

1.

The Supreme Court of the state of California erred in holding and deciding that the transportation of passengers and freight by the petitioner, Wilmington Transportation Company, over the high seas, for a distance of upwards of twenty miles, between the ports of San Pedro and Avalon (each of said ports being in the state of California), does not constitute commerce with foreign nations, within the meaning of section 8 of article 1 of the Constitution of the United States.

2.

Said court erred in holding and deciding that the authority sought to be exercised by the Railroad Commission of the state of California, under said state of California, to regulate the rates to be charged by said petitioner for such transportation over the high seas, and to otherwise regulate such transportation, is valid, and not repugnant to the Constitution of the United States, and particularly to said section 8 of article 1 thereof.

3.

Said court erred in deciding against and denying the right, privilege and immunity specially set up and claimed by said petitioner before said Railroad Commission of the state of California and before said Supreme Court of the state of California, under the Constitution of the United States, to be free of any control or interference by said Railroad Commission in the matter of said transportation by said petitioner over the high seas, and of the rates charged by said petition for such transportation.

THIRD.

ARGUMENT.

I.

TRANSPORTATION OVER HIGH SEAS CONSTITUTES "COMMERCE WITH FOREIGN NATIONS" AND IS THEREFORE SUBJECT TO REGULATION BY CONGRESS.

A—THIS POINT IS CONCLUDED BY ITS EXPLICIT DECISION IN LORD V. STEAMSHIP CO., AND SUBSEQUENT CASES.

LORD V. STEAMSHIP CO.: GROUNDS OF DECISION QUOTED.

The power of congress, under the commerce clause, to regulate transportation of the kind here in question was squarely decided in the leading case of Lord v. Steamship Company. That case involved the application of the limited liability law (U. S. Rev. Stat., secs. 4283, 4289) to contracts of affreightment between two ports of the state of California. The reasoning of the decision in sustaining the constitutionality of the act as so applied, is so concise that it cannot well be abbreviated, and we quote it in full:

> "The contracts sued on in the present case were in effect to carry goods from San Francisco to San Diego by the way of the

Pacific ocean. They could not be performed except by going not only out of California, but out of the United States as well.

"Commerce includes intercourse, navigation, and not traffic alone. This also was settled in Gibbons v. Ogden, *supra*. 'Commerce with foreign nations,' says Mr. Justice Daniel, for the court, in Veazie v. Moor (14 How. 568), 'must signify commerce which, in some sense, is necessarily connected with these nations, transactions which either immediately or at some stage of their progress must be extra-territorial.' (Page 573.)

"The Pacific ocean belongs to no one nation, but is the common property of all. When, therefore, the Ventura went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the state of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business

in which she was engaged were subject to the regulating power of congress.

"Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of 'external concern,' affecting the nation as a nation in its external affairs. It must, therefore, be subject to the national government.

"This disposes of the case, since, by sec. 4289 of the Revised Statutes, the provisions of sec. 4283 are not applicable to vessels used in rivers or inland navigation, and this legislation, therefore, is relieved from the objection that proved fatal to the trademark law which was considered in *Trade-Mark Cases,* 100 U. S. 82. The commerce regulated is expressly confined to a kind over which congress has been given control. There is not here, as in *Allen v. Newberry* (21 How. 244), a question of admiralty jurisdiction under the law of 1845, but of the power of congress over the commerce of the United States. The contracts sued on do not relate to the purely internal commerce of a state, but impliedly, at least, connect themselves with the commerce of the world, because in their performance the laws of nations on the high seas may be involved, and the United States compelled to respond.

"Having found ample authority for the act as it now stands in the commerce clause of the Constitution, it is unnecessary to consider whether it is within the judicial power of the United States over cases of admiralty and maritime jurisdiction."

Lord v. Steamship Co., 102 U. S. 541, 26 L. Ed. 224.

ABOVE CASE FOLLOWED BY JUSTICE FIELD IN RAILROAD COMMISSION CASE (18 FED. 10).

Lord v. Steamship Co., *supra,* was followed in a case decided by Mr. Justice Field (sitting with Judge Sawyer on circuit), wherein the Railroad Commission of California was enjoined from fixing rates for the transportation of passengers and freight between different ports of the state by vessels navigating the high seas. Holding that such navigation is not an act of domestic commerce, subject to state regulation, the learned jurist said:

> "When they go beyond the marine league they pass out of the jurisdiction of the state, and come under the exclusive control of congress. To bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state. Lord v. Steamship Co., 102 U. S. 541."
>
> Pacific Coast S. S. Co. v. Railroad Com., 18 Fed. 10, 13.

In the opinion of the Railroad Commission herein [Record, fol. 48] certain allegations of fact are made as to what is shown by the original record in the Circuit Court case just cited, from which an inference is sought to be drawn unfavorable to the authority of the decision in that case. Concerning these alleged facts we have no knowledge and nothing to say.

And as to the inferences drawn therefrom we will say no more than this: that for ourselves the honored names of the two judges by whom the decision was rendered sufficiently attests its genuineness; and its subsequent express approval by this court sufficiently attests its authority.

PRINCIPLE OF ABOVE CASES APPROVED AND APPLIED IN HANLEY CASE (187 U. S. 617).

The proposition laid down in the cases above cited, that the intrastate character of commercial transportation is to be determined by considering, not its termini alone, but its whole route, was again approved and applied by this court, in a case involving transportation by railroad between two points in the state of Arkansas, over a route extending into Indian territory, as then constituted. The situation presented in that case, if not precisely the same as that here arising, bears the closest possible analogy to it since the extra-state portion of the route, in both cases, is not under the jurisdiction of another state, but of congress; and accordingly this court regarded as controlling the two cases we have cited above. The reasoning of that decision, therefore, applies with full force to the case at bar. In the opinion, delivered by Mr. Justice Holmes, the court there said:

"Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.

"The transportation of these goods certainly went outside of Arkansas, and we are of opinion that in its aspect of commerce it was not confined within the state. * * *

"It is decided that navigation on the high seas between ports of the same state is subject to regulation by congress (Lord v. Goodall, N. & P. S. S. Co., 102 U. S. 541, 26 L. Ed. 224), and is not subject to regulation by the state (Pacific Coast S. S. Co. v. Railroad Commissioners, 9 Sawy. 253, 18 Fed. 10); and, although it is argued that these decisions are not conclusive, *the reason given by Mr. Justice Field* for his decision in the last cited case *disposes equally of the case at bar.* 'To bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state.'"

Hanley v. Kansas, etc. R. Co., 187 U. S. 619, 620.

LORD V. STEAMSHIP CO. PREDICATED SOLELY ON COMMERCE CLAUSE, NOT ON ADMIRALTY CLAUSE.

The decision in Hanley v. Kansas, etc. R. Co. further confirms the authority of Lord v. S. S. Co., *supra,* in that it dispels any doubt which might have been suggested concerning the last

named case, because of the opinion delivered in Lehigh Valley Ry. Co. v. Pennsylvania (145 U. S. 192). The last named case sustained a state tax upon the gross receipts of a railroad, derived from transportation between points in the same state, over a route extending into another state, proportioned to the mileage of the route within the state. Concerning the case of Lord v. Steamship Co., it was said in the Lehigh Valley case that the validity of the limited liability act, as applied to voyages between ports of the same state, *might* have been sustained in the former case, without reference to the commerce clause, on the strength of the federal admiralty and maritime jurisdiction; reference being made to cases decided *subsequent* to the Lord case, sustaining the limited liability act as an amendment of the maritime law, even as applied to wholly intrastate transportation. But that view of federal *legislative* authority, in aid of the admiralty and maritime jurisdiction of the federal courts, had not been established by the decisions, prior to the Lord case; and so far from sustaining the act there in question on that ground, the opinion in the Lord case, as we have seen, expressly disclaimed it, saying:

> "Having found ample authority for the act as it now stands in the commerce clause of the Constitution, *it is unnecessary to consider* whether it is within the judicial power

of the United States over cases of admiralty and maritime jurisdiction."

Lord v. Steamship Co., 102 U. S. 541, 545; 26 L. Ed. 224.

We may observe, in passing, that we believe it to be likewise unnecessary, in the case at bar, for this court to consider, and we shall therefore not argue, the question whether congress has power under the admiralty clause, as well as under the commerce clause, to regulate the rates to be charged for transportation upon the high seas.

The view taken in the Lord case, that the limited liability law was sustainable as a *commercial* regulation when applied to any species of transportation coming within the scope of the commerce clause, was fully justified by prior decisions of the court. See

The Lottawana, 21 Wall. 558, 577; 22 L. Ed. 654.

The expediency, if not necessary, of a power in the federal legislature to modify the maritime law (the administration of which was committed by the constitution to the federal courts) was indeed recognized in the case of The Lottawana, *supra*; but it was also there asserted that this legislation could be had "under the *commercial* power, if no other;" and it was distinctly affirmed that it was under the commercial power that the limited liability law had been enacted

(21 Wall., p. 577). But as to those maritime matters, if any, which could not be comprehended under the commerce clause, the power of congress to legislate was deliberately, and by repeated declarations in the opinion, left undecided in that case.

The Lottawana, 21 Wall. 558, 576-8, 581-2; 22 L. Ed. 654.

This was the last (if not the only) decision prior to the Lord case, in which this precise question was considered; and the doubt in which the construction of the admiralty clause, on this point, was then left, naturally induced the court, in the Lord case, to rest its decision upon the commerce clause alone, as to which it had no occasion to feel any doubt.

Furthermore, even if the court had expressly rested its decision in the Lord case upon the admiralty or maritime clause of the Constitution, as well as upon the commerce clause, it would still have been an authoritative precedent for the construction of the latter; *a fortiori* is it such a precedent when the court expressly confined its decision to the ground of the commerce clause alone.

Nor could the authority of the Lord case in respect to questions of *regulation* be rightly regarded as weakened by the Lehigh Valley case above referred to, even without the qualification

thereof by the decision in the Hanley case, *supra;* for the opinion in the Lehigh Valley case also referred to the decision in Pacific Coast S. S. Co. v. Railroad Commission, *supra,* rendered by Mr. Justice Field (who was still a member of this court when the Lehigh Valley case was decided, and expressed no dissent therein), and it distinguished Mr. Justice Field's decision in the Railroad Commission case as follows:

> "But that case involved the *direct regulation,* by a state, of transportation which had passed *beyond the jurisdiction of the state,* and did not decide the question of the power of a state to *tax its own corporations in respect of transactions within it* in the course of a continuous carriage from one point to another in the state, in accomplishing which a part of another state was incidentally traversed."
>
> Lehigh Valley Ry. Co. v. Pennsylvania, 145 U. S. 192, 204; 36 L. Ed. 672.

This distinction between the regulation involved in Pacific Coast S. S. Co. v. Railroad Comm., and the character of tax involved in Lehigh Valley Ry. Co. v. Pennsylvania, was again adverted to in the Hanley case, *supra;* and it was there further pointed out that such a tax, limited to "receipts of the proportion of the transportation within the state," had been sustained "in the case of commerce *admitted to be interstate*" (referring particularly to the case of Maine v. Grand Trunk R. Co., 142 U. S. 217,

decided at the same term as the Lehigh Valley case).

Hanley v. Kansas etc. R. Co., 187 U. S. 617, 621.

ABBY DODGE CASE (223 U. S. 166) APPROVES AND FOLLOWS LORD CASE

Not only has the authority of Lord v. Steamship Co., *supra*, thus been confirmed by the decision in the Hanley case, above cited; but its doctrine has been emphatically approved in a considerably later decision of this court, involving exactly the same question as to the extent of congressional authority under the commerce clause. In the case referred to, this court had before it an act of congress prohibiting the landing of sponges taken at certain seasons from the waters of the Gulf of Mexico. After holding that the Act, to be constitutional, must be limited to the taking of sponges outside the bounds of any state, and responding to the further contention that it was invalid even with respect to sponges so taken, it was said:

> "*Undoubtedly* (Lord v. Goodall, N. & P. S. S. Co., 102 U. S. 541, 26 L. Ed. 224), whether the Abby Dodge was a vessel of the United States or of a foreign nation, even although it be conceded that she was solely engaged in taking or gathering sponges in the waters which, by the law of nations, would be regarded as the common property of all, and was transporting the

> sponges so gathered to the United States, *the vessel was engaged in foreign commerce,* and was therefore amenable to the regulating power of congress over that subject. *This being not open to discussion,* the want of merit of the contention is shown, since the practices from the beginning sanctioned by the decisions of this court, establish that congress, by an exertion of its power to regulate foreign commerce, has the authority to forbid merchandise carried in such commerce from entering the United States."
>
> The Abby Dodge v. United States, 223 U. S. 166, 176.

The emphatic language of this decision leaves no room for doubt as to the authority of Lord v. Steamship Co., *supra,* or the doctrine, there announced, that the waters of the ocean and seas, outside the territorial limits of any state, are *foreign* as to all the states, and that all commerce, and therefore all transportation, over such waters, though it does not otherwise affect any foreign country, is foreign commerce within the purview of the federal constitution.

In view, however, of the refusal, not only of the Railroad Commission of California [Record, fol. 46], but of the Supreme Court of the state (the latter, however, with evident hesitation) [Record, fol. 72], to be governed by these decisions, something more may perhaps be expected of us here than a reliance upon those de-

cisions alone. Besides, it may well be, we believe, that the weight of the decision in the Lord case has suffered somewhat from the unusual brevity with which its grounds were stated, and the absence therefrom of the citation of that formidable array of authorities, which we are too accustomed to demand, but which now, at least, can be readily invoked in its support. This defect, if it be one, we may be here permitted to supply.

B—FURTHER AUTHORITIES CONFIRMATORY OF THE DECISION IN LORD V. STEAMSHIP COMPANY.

1—*What Is Essential to Commerce in the Constitutional Sense?*

In the opinion rendered by the defendant Railroad Commission sustaining its jurisdiction herein [Record, p. 28], an attempt was made to distinguish the Abby Dodge case, *supra*, on the ground that the sponges there in question, an article of commerce, were taken on board the vessel outside the state and thence transported into the state; whereas it is said, in the case at bar, the goods and persons transported begin and end their journey at points both within the state. This argument betrays, as it seems to us an entire misconception of the constitutional meaning of the term commerce, as that has been defined and settled by the decisions of this court.

ABBY DODGE CASE NOT DISTINGUISHABLE: COMMERCE IS NOT MANUFACTURE OR PRODUCTION.

In the first place, if it was intended by the learned Commissioner to argue that the taking of these sponges from their natural place and state, in order that they might become articles of commerce, was itself a commercial act, this is refuted by previous decisions of this court which were called to its attention by counsel in that case. (See brief of argument for appellant, 223 U. S. Rep., at pp. 168, 169.) This of itself shows that it cannot be supposed, even if it were otherwise conceivable, that the decision of the court was predicated upon a view of the facts in that case contrary to these previous decisions.

INTERCOURSE IS COMMERCE.

In the second place, as affirmed in Lord v. Steamship Company (on the authority of Chief Justice Marshall, in Gibbons v. Ogden), commerce, in the constitutional sense, is synonymous, *not* with *trade* or *traffic*, but with *intercourse*. This broader signification of "commerce" has become so nearly obsolete in the present day ordinary usage of the word that we need to be reminded that it was a very common use of the term in the period when the Constitution was adopted. (See, for illustration, the title "Commerce" in Webster's New Interna-

tional Dictionary, Century Dictionary, etc.) The assertion in Lord v. Steamship Company, *supra*, that the Constitution uses the term "commerce" in this more comprehensive sense, of intercourse, is abundantly confirmed by many decisions. See, e. g.:—

State of Pennsylvania v. Wheeling etc. Bridge Co., 18 Howard, 421, 431; 15 L. Ed. 435;

Knox v. Lee, 12 Wall. 457, 555; 20 L. Ed. 287;

Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1; 24 L. Ed. 708;

Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. Ed. 238.

United States v. Arjona, 120 U. S.. 479, 483; 30 L. Ed. 728;

Covington etc. Bridge Co. v. Kentucky, 154 U. S. 204; 38 L. Ed. 962;

Hanley v. Kansas etc. Co., 187 U. S. 617;

Champion v. Ames, 188 U. S. 321, 352;

International Text-Book Co. v. Pigg, 217 U. S. 90, 106;

Hoke v. United States, 227 U. S. 308.

Transportation Is Commerce, Regardless of Its Purpose.

These decisions also fully support the decision of the Lord case in its holding that the navigation (or other transportation), by which such

intercourse is effected, *regardless of its purpose,* is "commerce itself," and therefore a subject-matter committed by the commerce clause to congressional regulation. To the same point see the explicit statement of this principle already quoted from

Hanley v. Kansas etc. R. Co., *supra,* 187 U. S. 617, 619,

and the very similar views expressed (especially in the concurring opinion by Mr. Chief Justice White) in the very recent "Pipe Line Cases,"—

U. S. v. Ohio Oil Co., 234 U. S. 548.

For further authority to the same point, see also:

Railroad Company v. Husen, 95 U. S. 465, 470; 24 L. Ed. 527;

In re Debs, 158 U. S. 564, 590;

Union Bridge Co. v. United States, 204 U. S. 364, 385;

Second Empl. Liab. Case, 223 U. S. 1, 46, 48;

Philadelphia Co. v. Stimson, 223 U. S. 605, 634;

Omaha etc. R. Co. v. I. C. Comm., 230 U. S. 324, 336.

Transit from One Jurisdiction to Another the Only Essential.

In Mobile County v. Kimball, *supra,* the rule was stated in terms of special significance for our case, viz.:

> "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation *and transit* of persons and property, as well as the purchase, sale and exchange of commodities."
>
> Mobile County v. Kimball, 102 U. S. 691, 702; 26 L. Ed. 238.

Quoted and approved in

> N. Y. Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 511.

See also:

> The Daniel Ball, 10 Wall. 557, 565, 19 L. Ed. 999.

In the Covington Bridge case, *supra,* this rule was given a striking, but still a necessary application. Speaking of the passage of persons, by foot or otherwise, over a bridge across a river whose shores lay in different states, this court said:

> "Commerce was defined in Gibbons v. Ogden, 9 Wheat. 1, 189, to be 'intercourse,' and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they

were shipping cargoes of merchandise from New York to Liverpool."

Covington etc. Bridge Co. v. Kentucky, 154 U. S. 204, 218.

Similarly, in the recent case above cited, sustaining the so-called "white slave act," it was declared:

"Commerce among the states, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, *a person may move* or be moved *in interstate commerce.*"

Hoke v. United States, 227 U. S. 308, 320.

There can be no doubt that, under this settled interpretation of the Federal Constitution, a carrier who transports persons or goods out of any state into waters subject to the jurisdiction of some foreign nation, is engaged in foreign commerce, regardless of the purpose of the journey, or whether it has any purpose; *regardless, also, of whether the goods or persons transported are landed upon the territory of such foreign nation or not.*

It logically and necessarily follows, as held in the Lord case, *supra*, and reaffirmed in the Abby Dodge case, *supra*, that such extra-state transportation is equally foreign commerce,

when the region into which it extends belongs not exclusively to one foreign nation, but in common to all those nations.

It is further, we submit, established by the decisions above cited, and many others confirmatory thereof, that the *intercourse* between citizens or subjects of different jurisdictons (or between subjects of one and the sovereignty of another), which *necessarily* results from the transportation of either goods or persons from a place subject to one sovereignty or jurisdiction to a place subject to another sovereignty or jurisdiction, is all that is essential to "commerce" in the constitutional sense. *It is not necessary* that there should be, in addition to such change of the jurisdictional status of such goods or persons, *any transaction, or dealings, or communication,* between the citizens or subjects of the different jurisdictions concerned or their respective sovereignties.

Application of Principle to Transportation Onto the High Seas.

Unquestionably, "intercourse" of essentially the same sort results from the carrying of passengers or property out of a state into the waters beyond its jurisdiction,—beyond, too, the jurisdiction even of the federal government; (as expressed in Lord v. Steamship Company, "not only out of California, but out of the United

States, as well.") For such waters, while not subject to the exclusive jurisdiction of any one foreign nation, are common to all the nations and subject to that "law of nations" which is maintained in force by their common consent, sanctioned by their mutual adherence to immutable principles of justice and right. The regulation of all engaged in commerce and navigation upon the high seas, it may not be out of the way to remark, has always been a prime object of this international law. To go out, therefore, from the territory of any state upon these waters governed, not by the law of such state, but by the law of nations, necessarily effects a change of legal status, and creates or assumes new legal relations with foreign sovereignties and their subjects,—and this, although it chances that there is no actual contact or communication with them. Such change of legal status, and assumption of legal relations with other sovereignties and their subjects, constitutes intercourse which is of the same character (in all that is essential here) as that which is effected by the movement of persons or property from a state into the territory of some one foreign country.

The fact that the persons or property carried from the territory of a state onto the waters common to all the nations happen, in the course of their journey, to be returned to the territorial

jurisdiction of the state whence they started, cannot affect this result. The only difference is that in such a case there is a double, instead of a single, change of legal status and relations.

The attempt of the defendant in error, above noted, to distinguish between the Abby Dodge case and the case at bar therefore fails, since it counts upon a circumstance which is wholly immaterial to the essential legal consequences.

2—*The Federal Government Is Charged with the Exclusive Responsibility as Well as Control of All "External Affairs," Including All Foreign Relations and Intercourse.*

There is yet another ground of decision, relied on by the court in the case of Lord v. Steamship Co., *supra*, which it may be appropriate, although unnecessary, to reinforce by further citation of authorities.

INTERNATIONAL CONSEQUENCES FROM ACTION OF STATES AND INDIVIDUALS.

Prior to the decision in the Lord case, this court, in Chy Lung v. Freeman, referring to claims which might be made on behalf of aliens for wrongs done by the state or its citizens, had drawn attention to the very same considerations which were invoked by Mr. Chief Justice Waite in the Lord case, with reference to such claims arising out of navigation upon the high seas.

The language of the court in the Chy Lung case runs thus:

> "Upon whom would such a claim be made? Not upon the state of California; for, by our Constitution, *she can hold no exterior relations with other nations.* It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the federal government? If that government has forbidden the states to hold negotiations with any foreign nations, or to declare war, and *has taken the whole subject of these relations upon herself,* has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the states to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the states the acts for which it is held responsible?
>
> "The Constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to congress and not to the states. *It has the power to regulate commerce with foreign nations; the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government.* If it be otherwise, a single state can, at her pleasure,

embroil us in disastrous quarrels with other nations."

Chy Lung v. Freeman, 92 U. S. 275, 279, 23 L. Ed. 550.

"GENIUS OF THE CONSTITUTION": COMMITS ALL "EXTERNAL AFFAIRS" TO FEDERAL GOVERNMENT: HENCE ITS POWER OVER FOREIGN COMMERCE.

The same view of the relative functions of the federal and state governments under the Constitution had long before been elucidated by Mr. Chief Justice Marshall, in Gibbons v. Ogden, where he said:

> *"The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation,* and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."
>
> Gibbons v. Ogden, 9 Wheat. 1, 195; 6 L. Ed. 23.

Again, subsequent to the decision of the Lord case, in United States v. Arjona, sustaining an act of congress forbidding the counterfeiting of foreign securities, public or corporate, this court said:

> *"The government of the United States has been vested exclusively with the power*

> *of representing the nation in all its intercourse with foreign countries. It alone can 'regulate commerce with foreign nations,'* Art I, sec. 8, clause 3; make treaties and appoint ambassadors and other public ministers and consuls. Art. II, sec. 2, clause 2. A state is expressly prohibited from entering into any 'treaty, alliance, or confederation.' Art. I, sec. 10, clause 1. Thus all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose given to the United States. *The national government is in this way made responsible to foreign nations for all violations by the United States of their international obligations,* and because of this, Congress is expressly authorized 'to define and punish * * * offenses against the law of nations.' Art. I, sec. 8, clouse 10."
>
> United States v. Arjona, 120 U. S. 479, 483; 30 L. Ed. 728.

The phrase "violations by the United States," etc., in the foregoing was meant to include violations *by individuals,* as the context, and the facts of the case, clearly show.

This same conception of the nature of the federal government's power over foreign commerce, as being one of the essential means by which that government is to effectually control all intercourse and relations with foreign nations and their people, has been made the basis of decision in other cases, particularly those sustaining the validity of legislation regarding

the admission and exclusion of alien immigrants. Resisting the temptation to quote *in extenso* from these decisions, we restrict ourselves to a bare citation of some of the more pertinent:

Chinese Exclusion Cases, 130 U. S. 581, 604; 32 L. Ed. 1068;

Ekiu v. United States, 142 U. S. 651, 659; 35 L. Ed. 1146;

Lem Moon Sing v. United States, 158 U. S. 538, 542.

Bearing in mind this fundamental and established interpretation of the federal power under the commerce clause, thus read in the light of the Constitution as a whole, how can it be questioned that its comprehensive reach embraces *all* commerce and navigation over *"the highway of nations?"*

It is no doubt true that this serious and vital concern of the federal government, as the exclusive organ of international relations, with the possible consequences of the intermingling of domestic shipping with the shipping of foreign countries upon the high seas, would not justify giving the terms of the commerce clause a construction contrary to their clear meaning or intent. But the terms of the clause being, as they are, fairly open to a construction which embraces this species of commercial acts within its scope, this consideration affords, as urged by

the opinion in the Lord case, a most cogent reason for the construction there given to the Constitution.

3—*Free Access and Transit to All Parts of All States a National Concern.*

Another consideration leading to the same conclusion, viz., the very substantial interest of the nation at large in the availability of adequate transportation to such a place as Santa Catalina Island—essentially the same as if the Island were part of the territory of some other state, or some foreign country—is elsewhere fully discussed (see division of our brief designated, "III," "D," "3"). It therefore need not be elaborated here; but, obviously, it affords an additional and persuasive reason for holding the transportation here in question subject to federal regulation.

4—*Transportation from a State to a Territory, Held a Species of "Commerce Among the States," Is Entirely Analogous to the Species of "Commerce with Foreign Nations" Here in Question.*

One other consideration confirming, as we think conclusively, the soundness of the decision in Lord v. Steamship Company, *supra*, is that an analogous problem has confronted this court in defining the scope of the same constitutional

provision as regards interstate commerce, and has been resolved in the same way. Territory, such as that of the District of Columbia, and of the territories not yet organized into states, may fairly be said to bear a jurisdictional relation to the different states of the Union essentially like that which the high seas bear to the several nations of the world. For such territory is not subject to the jurisdiction of any one state, but it is common to all the states: in respect to their interests and rights therein, through their relation to the Union into which they have voluntarily entered; and common, too, in respect to the intercourse of their citizens therewith. Hence, transportation between such territory, and some one of the states, may rightly be regarded as "commerce among the *states*" within the constitutional intent, although only *one* state is actually entered in the course of such transportation, and this court has so held.

Stoutenburgh v. Hennick, 129 U. S. 141; 32 L. Ed. 637.

This point was not elaborated in the opinion delivered for the court in the case just cited; but that it was not overlooked is apparent, both from the separate opinion of Mr. Justice Miller in that case, in which he dissented from the decision of the court on this question, but also

from the reference to this decision in the Hanley case, *supra*, where the same principle was applied to what was then Indian Territory.

Hanley v. Kansas etc. R. Co., 187 U. S. 617, 619.

It has obviously been assumed to be the settled law in other cases also, e. g.,

New Mexico (McLean) v. Denver etc. R. Co., 203 U. S. 38.

Western Union Telegraph Co. v. Brown, 234 U. S. 542.

THE RESULT.

In thus defining the scope of interstate and of foreign commerce, in respect to the national power of regulation under the Constitution, there has been given to the commerce clause of that instrument a natural and reasonable operation, whereby it comprehends all transportation which is not confined within the limits of any one state. By this interpretation of the Constitution a line, at once rational and certain, is drawn between the nation's and the state's field of regulation, the latter being thereby appropriately limited to cases where the "subject transported [is] within the entire voyage under the exclusive jurisdiction of the state" (Hanley v. Kansas etc. R. Co., *supra*), while the former embraces all other cases.

II.

CONGRESS HAS REGULATED TRANSPORTATION BY WATER, IN INTERSTATE AND FOREIGN COMMERCE, AND ANY STATE REGULATION THEREOF, IF OTHERWISE VALID, IS THEREBY EXCLUDED.

In the logical development of the law applicable to the case at bar, our present proposition might more properly come after that which we shall next discuss, namely, that the power of congress to regulate the transportation here in question is exclusive. Nevertheless, since it is also true that if congress *has* regulated this transportation, there can be no valid regulation thereof by the state, the court will be relieved of the necessity of deciding whether the federal power involved is exclusive, if it is made to appear that such power has been exercised.

Plaintiff's Vessels Licensed and Enrolled for Coasting Trade.

It was stipulated at the hearing of this matter before the defendant Railroad Commission, as the record shows, that all the vesels employed by the plaintiff in error in its transportation between the mainland and Santa Catalina Island "are enrolled and licensed to carry on the coasting trade under the acts of the federal congress." [Record, fol. 35.]

This is precisely the same fact which was shown in the great and leading case of Gibbons v. Ogden, *supra,* and which the court there held conclusive against any power of the state of New York to hinder the carrying on of the coasting trade, under such congressional license, even within the limits of that state, where it constituted part of transportation between different states.

GIBBONS V. OGDEN: RIGHT CONFERRED BY FEDERAL LICENSE CANNOT BE IMPAIRED BY STATE ACTION.

In that case, referring to the privileges conferred by such federal license to carry on the coasting trade, the court said:

> "These privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act."
>
> Gibbons v. Ogden, 9 Wheat. 1, 213, 6 L. Ed. 23.

Subsequent Decisions on Effect of Federal License.

The doctrine thus early laid down by the court has been applied in many subsequent cases.

Thus, in Sinnot v. Davenport, a law of Alabama "requiring the owners of steamboats navigating the waters of the state, before such boat shall leave the port of Mobile, to file a statement in writing, in the office of the probate judge of Mobile county—setting forth, first, the name of the vessel; second, the name of the owner or owners; third, his or their place or places of residence; fourth, the interest each has in the vessel"—was held violative of the rights conferred by the federal license.

> Sinnot v. Davenport, 22 How. 227, 16 L. Ed. 243.

Again, in Moran v. New Orleans, a city ordinance requiring the payment of a license tax upon the occupation of owning and running tugboats (used in moving vessels engaged in interstate or foreign commerce) was held void; and the court, referring to the effect of such ordinance upon vessels holding a federal license, said:

> "The conflict between the two authorities is direct and express. What the one declares may be done without the tax, the other declares shall not be done except upon

payment of the tax. In such an opposition, the only question is, which is the superior authority? and reduced to that, it furnishes its own answer."

Moran v. New Orleans, 112 U. S. 69, 75, 28 L. Ed. 653.

The subsequent case of Harman v. Chicago involved a very similar license tax under an ordinance of the city of Chicago; and it was held void as applied to boats licensed for the coasting trade, under the act of congress, the court saying:

"In Gibbons v. Ogden, 9 Wheat. 213, this court held that vessels enrolled and licensed pursuant to the laws of the United States, as these tugs were, had conferred upon them *as full and complete authority* to carry on this trade *as it was in the power of congress to confer.*"

The court then reviewed many cases upon the subject, including those we have above cited, and further said:

"Waters navigable in themselves in a state, and connecting with other navigable waters so as to form a waterway to other states or foreign nations, cannot be obstructed or impeded so as to impair, defeat or place any burden upon a right to their navigation granted by congress. Such right the defendants had from the fact that their steam barges and towboats were enrolled and licensed, as stated, under the laws of the United States."

Harman v. Chicago, 147 U. S. 396, 405, 411, 412, 37 L. Ed. 216.

STATE REGULATION OF RATES WOULD IMPAIR RIGHTS UNDER FEDERAL LICENSE.

The facts of the case at bar, we submit, cannot be distinguished from those involved in the cases above cited. It is true that the state action here involved is not the levying of a tax upon, but the regulating of the rates of, transportation. But, as this court has distinctly said:

> "*It is impossible to see any distinction* in its effect upon commerce of either class, between a statute which *regulates the charges* for transportation, and a statute which *levies a tax* for the benefit of the state upon the same transportation."
>
> Wabash etc. R. Co. v. Illinois, 118 U. S. 557, 570, 30 L. Ed. 244.

The like identity, in effect, has been asserted in numerous other cases, many of which we shall have occasion to cite in subsequent portions of this brief. The principle, we submit, is not open to dispute.

Furthermore, as we have elsewhere argued in this brief (see particularly division designated "III," "D," "3"), the interest of the nation at large in maintaining free access and transit to the Island of Santa Catalina, from the mainland of California,—separated as they are by more than twenty miles of "high seas,"—is exactly the same as if that island were part of some other state or foreign country. Hence,

we submit, no possible distinction can be drawn, as to the nature of the "commerce" involved, between the case at bar and the several cases herein cited, declaring the effect of the federal license to carry on such commerce.

TRUE INFERENCE FROM OMISSION OF WATER CARRIERS FROM INTERSTATE COMMERCE ACT.

The claim was made for the Railroad Commission in the court below—predicated upon the provisions of the Interstate Commerce Act—that congress has not exercised its power of regulating *water* transportation. The contention scarcely requires further reply than the citation of the foregoing authorities. It is true that the act of congress referred to clearly, *and purposely,* has not subjected water carriers (except where operated jointly, etc., with railroads) to the jurisdiction of the commission created by that act. But it is obvious, we submit, that defendant in error draws the wrong inference from that circumstance. The failure of congress to subject water carriers to regulation by the Interstate Commerce Commission does not imply that they were intended to be subject to regulation by the states, but rather that they were not to be regulated at all, except in the matters as to which congress had already regu-

lated them, and, in other matters, by the principles of the common law.

REGULATION MAY BE IMPLIED AS WELL AS EXPRESS.

The doctrine on which this conclusion rests has been affirmed in many cases, although, we concede, in a somewhat different aspect. The principle was stated in Hall v. DeCuir, as follows:

> *"This power of regulation may be exercised without legislation as well as with it.* By refraining from action, congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the states, in the regulation of their *domestic* concerns, have established *affecting commerce, but not regulating it* within the meaning of the Constitution."
>
> Hall v. DeCuir, 95 U. S. 485, 490, 24 L. Ed. 547.

Essentially the same principle was affirmed in Western Union Tel. Co. v. Call Publishing Co., where it was said:

> "This court has often held that the full control over interstate commerce is vested in congress, and that it cannot be regulated by the states. It has also held that the inaction of congress is indicative of its intention that such interstate commerce shall be free; and many cases are cited by coun-

sel for the telegraph company in which these propositions have been announced."

Western Union T. Co. v. Call Publ. Co., 181 U. S. 92, 100.

The doctrine, indeed, had its origin in the generic case of Gibbons v. Ogden, although the court did not think it necessary to apply the rule in that case (except in the limited way that we seek to apply it in this case). In the opinion delivered by Mr. Chief Justice Marshall reference was made to the contention of counsel "that regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated." As to which the court said: "There is great force in this argument, and the court is not satisfied that it has been refuted."

Gibbons v. Ogden, 9 Wheat. 1, 209, 6 L. Ed. 23.

See, also, the opinion of Mr. Justice Story, in New York v. Miln, 11 Pet. 102, 158, 9 L. Ed. 648.

DOCTRINE REQUIRING SPECIFIC ACTION OF CONGRESS NOT APPLICABLE.

Some reliance was also placed by defendant in error upon the rule announced in Southern R. Co. v. Reid (222 U. S. 424) and other cases, that, with reference to certain forms of state action affecting interstate transportation, they are not deemed excluded by action of congress, unless the latter specifically covers the same field. But, as these cases themselves disclose, and as is clearly indicated in the passage above quoted from Hall v. DeCuir, the state action thus sanctioned is only that affecting commerce remotely, or indirectly, and *"not* regulating it within the meaning of the Constitution." This distinction is too well established by the decisions of this court to require further citations. (Besides, we have discussed it fully, to the best of our ability, in subsequent divisions of our brief, to which we invite the attention of the court, if the point should be deemed material in this connection.) It will be enough here, we believe, to barely cite the cases which have held that fixing rates for transportation *does* "amount to regulation of commerce" in the sense of this distinction:

Wabash etc. R. Co. v. Ill., 118 U. S. 557, 30 L. Ed. 244;

Covington etc. Bridge Co. v. Kentucky, 154 U. S. 204;

Louisville & N. R. Co. v. Eubanks, 184 U. S. 27;
Smyth v. Ames, 169 U. S. 466, 541;
Hanley v. Kansas etc. R. Co., 187 U. S. 617;
Railroad Comm. v. Worthington, 225 U. S. 101.

OTHER FEDERAL REGULATIONS: ALL THAT CONGRESS THOUGHT DESIRABLE.

In this case it is to be further considered, also, that the acts of congress providing for the enrollment and licensing of vessels engaged in the coasting trade are not the only regulations of such transportation by authority of congress. That body has also prescribed various other requirements concerning the vehicles of such transportation and other features thereof, which we need not stop to particularize. With all of these regulations, of course, the plaintiff in error has been obliged to comply, although that fact is not specifically stated in the record herein.

Having regard to all of these regulations, therefore, it must be true, as declared in the opinion of Mr. Justice Field, in the Railroad Commission case heretofore cited, that

> "Congress has prescribed all the regulations which are permissible, so far as that commerce is carried on in vessels. Those

> regulations, it is true, are principally designed to insure safety in the navigation of the vessels, and the protection and health of their officers and crews. Congress has not attempted to prescribe what charges may be made for the carriage of persons and merchandise in vessels; considering, perhaps, that they were more likely to be regulated upon just and equitable principles by competition than by legislation. Whatever the reason, congress has not seen fit to act upon that subject."
>
> Pacific Coast S. S. Co. v. Railroad Comm., 18 Fed. 10, 12.

It is unnecessary, we believe, to add, as we might, authorities to the same general principle in confirmation of this specific decision.

Confusion and Burden from Regulation of Service by Congress and of Rates by the State.

Furthermore, it is a strong reason to support this conclusion of Mr. Justice Field that congress, having regulated the transportation of the character here in question in so many vital particulars--which, altogether, are practically determinative of the cost of carrying on that transportation—it would be most unreasonable to permit an independent authority to determine the charge to be made for such transportation. This point, also, we have developed elsewhere

in the brief and it need not be further presented here.

Finally, as must be obvious, this contention of the learned commissioner, that specific action by congress for the regulating of the rates for plaintiff's transportation must be shown, in order to exclude state action thereon, runs directly counter to the decision in Gibbons v. Ogden, *supra*, and the other cases applying the same rule as to the effect of federal license to carry on a coasting trade.

Wherefore, we submit,—whatever view this court may take regarding the exclusiveness of the federal power to regulate the transportation in question here,—that power has been so far exercised as to clearly exclude the regulation thereof by the state of California herein attempted.

III.

THE POWER OF CONGRESS TO REGULATE RATES FOR TRANSPORTATION IN COMMERCE ON THE HIGH SEAS IS EXCLUSIVE, AND STATE REGULATION THEREOF IS THEREFORE VOID.

A—EXCLUSIVENESS OF THE FEDERAL POWER TO REGULATE THESE TRANSPORTATION RATES FORECLOSED BY PERTINENT DECISIONS.

PRESENT STANDING OF RULE THAT FEDERAL POWER TO REGULATE COMMERCE IS EXCLUSIVE.

It may be doubted if there is another principle of constitutional law which in the last forty or fifty years has been more often announced, or which is now more firmly established by the decisions of this court, than that the power to regulate interstate and foreign commerce is vested exclusively in Congress and cannot be exercised by the states. This rule was clearly stated in at least three different decisions rendered at the last term of this court by as many of its different members.

D. E. Foote & Co. v. Stanley, 232 U. S. 494;

Kansas C. S. R. Co. v. Drainage District, 233 U. S. 75;

International Harvester Co. v. Kentucky, 234 U. S. 579.

A similar citation of recent decisions delivered by other members of this court could likewise be made, if there were any excuse for doing so; but there is none, for it was emphatically declared, with the concurrence of the whole court, in one of such cases, that:

> "It is not necessary to review the cases in this court, which have *settled beyond peradventure,* that the national government has exclusive authority to regulate interstate commerce under the constitution of the United States."
>
> Railroad Commission v. Worthington, 225 U. S. 101, 107.

NO DIFFERENCE, AS TO FEDERAL POWER, BETWEEN INTERSTATE AND FOREIGN COMMERCE.

True, that decision, and most, perhaps, of the others declaring the exclusive power of Congress, dealt with interstate commerce. But it is also "settled beyond peradventure" that there is no difference in this regard between interstate and foreign commerce.

> "Power over one is given by the constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive."
>
> Railroad Co. v. Husen, 95 U. S. 465, 470, 24 L. Ed. 527;
>
> Hinson v. Lott, 8 Wall. 148, 151, 19 L. Ed. 387;

Brown v. Houston, 114 U. S. 622, 630, 29 L. Ed. 257.
Leisy v. Hardin, 135 U. S. 100, 110-11, 34 L. Ed. 128;
Crutcher v. Kentucky, 141 U. S. 47, 57, 35 L. Ed. 649;
Sault Ste. Marie v. International Transit Co., 234 U. S. 333.

It being further established, as we have shown, that the transportation here in question constitutes foreign commerce, the only possible question remaining for discussion is whether the action attempted to be taken in this case by the state of California, through the defendant Railroad Commission, amounts to regulation of that commerce.

FIXING TRANSPORTATION RATES IS REGULATION OF COMMERCE: PRECISE AUTHORITIES.

This point also, we submit, is foreclosed against the defendant in error by repeated decisions of this court rendered in cases "on all fours" with the case at bar, i. e., cases of attempted regulation of rates for transportation

—to say nothing of the host of other decisions in cases which are analogous in principle.

Wabash etc. R. Co. v. Ill., 118 U. S. 557, 30 L. Ed. 244;

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204;

Smyth v. Ames, 169 U. S. 466, 541;

Louisville & N. R. Co. v. Eubanks, 184 U. S. 27;

Hanley v. Kansas etc. R. Co., *supra*, 187 U. S. 617;

Railroad Comm. v. Worthington, *supra*, 225 U. S. 101.

The court, in deciding the last case cited, declared it unnecessary to do more than

> "reaffirm the equally well settled proposition that over interstate commerce transportation rates the state has no jurisdiction, and that an attempt to regulate such rates by the state or under its authority is void."
>
> Railroad Comm. v. Worthington, 225 U. S. 101, 107.

It is worth specially noting that while the last cited case was decided after the amendments to the Interstate Commerce Act which vested the federal Commission with direct authority to fix rates, the court put its decision solely on the ground that the order of the Railroad Commission there in question was "an at-

tempt to regulate interstate commerce and is therefore beyond the power of the state," and therefore declined to consider the possible effect of the act. (225 U. S. 111.)

So also, in the Hanley case, *supra*, decided in 1902, the decision was rested squarely on the total want of jurisdiction in the state to establish the rate there involved; so that the question, if any was raised, as to action having been had by congress, was not considered.

It would be doing scant justice to the elaborate opinion rendered on behalf of this court in the so-called "Minnesota Rate Case," at October term, 1913, not to refer thereto in this connection. And while that case involved a rate regulation the very opposite in character from that here in question—a regulation of wholly intrastate transportation rates—the opinion, nevertheless, laid down a rule decisive of the case at bar, and contrary to the position here taken by the defendant Railroad Commission, for it was there said:

> "The grant in the constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, *if regulated at all, their regulation*

should be prescribed by a single authority."

Simpson v. Shepard, 230 U. S. 352, 400.

As we shall later undertake to show, the qualification in the above quoted statement of the rule of exclusive federal power,—commencing with the words "with respect," etc., was unnecessary, if the phrase "interstate commercial intercourse" was used as synonymous with "commerce in the constitutional sense," as defined by repeated decisions of this court. Nevertheless, the thought evidently underlying this pronouncement is in line with the reasoning of the decisions in the rate regulation cases above cited, and especially that in the Hanley case, where it was said:

> "No one contends that the regulation could be split up according to the jurisdiction of state or territory over the track, or that both state and territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress."
>
> Hanley v. Kansas etc. R. Co., 187 U. S. 619, 620.

OPINIONS OF STATE COURT AND COMMISSION SHOW NO GROUND FOR DISREGARDING THESE AUTHORITIES.

The learned court below having rested its decision on the ground that the commerce here

in question did not come within the regulating power of Congress at all, the question of the exclusiveness of that power was not considered. We can only assume that if that court had felt bound by the decisions of this court in Lord v. Steamship Company and the other cases, above cited, following and approving that decision, it would also have acknowledged and followed the rule of the rate regulation cases on which we rely.

These latter cases were not referred to, either, by the Railroad Commission in its opinion herein [Record, fols. 34-58]; but in the argument presented on its behalf, before the state court, the authority of these decisions was denied, as applied to the case in hand, and since the rules of this court do not contemplate the filing, as a matter of course, of a reply brief, it seems proper that we anticipate the repetition here of the contentions below, and submit at this time our answer thereto.

In the argument for the Railroad Commission, above referred to (presented on its behalf, as counsel, by the same member of the Commission who delivered its opinion printed in the record here), the decisions we have cited, specifically holding void the regulation of transportation rates under state authority, were waived aside with the sole comment that they

dealt with cases of *interstate* commerce. But that circumstance is wholly irrelevant, as we have sufficiently shown.

Dealing with the constitutional question more generally, the position was taken, both in the opinion and in the argument of the learned Commissioner, that the case at bar falls within that class in which it has been conceded that state action is permissible until the field is occupied by congressional action. Substantially the only contention made in support of this position was that the regulation of the transportation here in question was a "local," not a "national" affair, within the distinction suggested in Cooley v. Port Wardens (12 How. 299).

TERMINI OF TRANSPORTATION ROUTE ALONE NOT CONCLUSIVE OF "LOCAL" CHARACTER.

We cannot but think that contention necessarily, and conclusively, refuted by the decisions we have here invoked denying state authority to regulate interstate and foreign transportation rates. Some excuse for arguing that the case at bar is distinguishable from certain of our citations by the fact that here the termini of the transportation are both within the state, there might have been, had the point not been expressly met and disposed of by the decision of Mr. Justice Field, at circuit, in

Pacific Coast S. S. Co. v. Railroad Comm., *supra*, 18 Fed. 10,

affirmed by this court, applying the same principle to the case of transportation between two points of a state over a route extending into a territory, under the jurisdiction and control of Congress, in

Hanley v. Kansas etc. R. Co., 187 U. S. 617, 619.

We have already drawn attention to the complete analogy between the Hanley case just cited and the case at bar: since in that case, as in this, the extra-state portion of the transportation route lay, not within the jurisdiction of any other state, but solely within the jurisdiction of Congress. Hence the undeniable application to the case at bar of the principle there asserted (approving and adopting the language of Mr. Justice Field, in the Railroad Commission case):

> "To bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state."
>
> Hanley v. Kansas etc. R. Co., 187 U. S. 617, 619, 620.

Reasons for Further Discussion of General Principles.

While it may be unnecessary, it can do no harm, for us to go on and show, as can certainly be done, that the contention of the learned Commissioner is contrary not only to the specific decisions we have cited, but to the general principles established by the great body of decisions in this court dealing with the validity of state action affecting interstate and foreign commerce, and we shall here undertake it.

We perhaps should add that we apprehend also that the decision of this court (delivered since the judgment of the court below was rendered), in Port Richmond etc. Ferry Company v. Freeholders (234 U. S. 317) will be claimed to lend support to the above stated contentions of the defendant in error. It would be a want of candor to assert that there is no warrant at all for this claim, in the argument of the opinion in that case. But both the decision and the opinion therein must, under the settled rule, be viewed in the light of the particular facts in that case,—as well as of the principles of constitutional law defining the relative powers of state and nation under the commerce clause, developed in more than fifty years of adjudication since the decision in Cooley v. Port Wardens was rendered. It therefore seems necessary, before further discussion of the Port Richmond

Ferry case, above mentioned, to demonstrate what are those settled principles of law upon this head which are the fruit of this long course of decision.

For the court's sake, we regret that any adequate discussion of the question in this broader aspect will necessarily involve an extended review of the cases and the principles of decision established thereby. We promise, however, the utmost brevity consistent with a fair presentation of the only question at issue, namely: "Is the action under state authority, here attempted, a regulation of the commerce carried on by the plaintiff in error?"

B—COMMERCE AND REGULATION IN THE CONSTITUTIONAL SENSE:—STATE ACTION WHICH DOES, AND THAT WHICH DOES NOT, AMOUNT TO REGULATION: THE DISTINGUISHING CHARACTERISTICS.

1—*The Strict Definition of Commerce: "Commerce in the Constitutional Sense."*

It may be well to quote here from the much cited case of Cooley v. Port Wardens its exact statement of the doctrine relied on in the argument of the learned Commissioner herein.

THE RULE IN COOLEY V. PORT WARDENS.

> "Whatever subjects of this power are in their nature national, *or* admit only of one uniform *system, or plan* of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that, until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits."
>
> Cooley v. Port Wardens, 12 How. 299, 319, 13 L. Ed. 996.

We have italicized the conjunction "or" in the beginning of the foregoing passage, because it seems often to have been misread as "and." Likewise, we have italicized the words "system or plan," because the case seems often to have been read as requiring uniformity in the regulations themselves—which, as to most matters, even of the kind admitted to be "national," is clearly impossible.

What Is "Uniform System or Plan" of Regulation.

Very clear light on the true meaning of this phrase "uniform system or plan of regulation," is found in the concurring opinion delivered by Mr. Justice Johnson in the case of Gibbons v. Ogden. Referring to the circumstances which surrounded and induced the adoption of the commerce clause, he there showed that the purpose of the clause was to transfer to the *one* national government *all* the power that the individual states had theretofore possessed over commerce which extended beyond their respective borders. So that this *unity* of control was the "uniform system or plan of regulation" which was (in these, or very like terms), then declared to be desirable.

> Gibbons v. Ogden, 9 Wheat. 1, *223 et seq*; 6 L. Ed. 23.

This interpretation of the phrase accords exactly with the meaning ascribed to it in subsequent decisions of this court, as we shall presently show.

If not already evident from what we have said concerning this concurring opinion in Gibbons v. Ogden, a reading thereof will show that it clearly and completely refutes the argument attempted to be drawn in the opinion of the Railroad Commission herein [Record, fol. 40

et seq.] from these circumstances surrounding the adoption of the commerce clause.

CHANGE IN TERMINOLOGY BETWEEN EARLIER AND LATER DECISIONS: ITS JUSTIFICATION.

The decision in Cooley v. Port Wardens, above quoted, sustained a statute of Pennsylvania dealing with a subject (the regulation of pilots and pilotage) which the court declared was one upon which Congress must have power to legislate, when deemed necessary, under the commerce clause, and on this ground they expressly affirmed that the statute in question, although the act of a state, was a *"regulation of commerce."* (12 How., pp. 316, 317.)

This mode of designating the character of such state action affecting commerce as was there involved has long been practically discarded by this court. Thus, in Smith v. Alabama, speaking of essentially the same sort of state action (prescribing the qualifications of locomotive engineers), this court, while sustaining the provisions of the statute as applied to operators of interstate trains, while within the state, declared that they were *"not* regulations of interstate commerce. It is a *misnomer* to call them such."

Smith v. Alabama, 124 U. S. 465, 480, 31 L. Ed. 508.

The transition from the earlier to this later conception of such state action is explained and justified in a number of cases decided intermediate the two above noted. In one of these, speaking for the court, and discussing the rule of exclusive federal power, Mr. Justice Field said:

> "Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind *the distinction between commerce as strictly defined, and its local aids or instruments,* or measures taken for its improvement. Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined *there can be* only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce."
>
> County of Mobile v. Kimball, 102 U. S. 691, 702, 26 L. Ed. 238.

What Subjects of Commercial Regulation Are "National" and What "Local."

The importance of the conception, or definition, of commerce in the constitutional sense, above set forth, lies not in its influence upon the terminology of the subject, of course, but in the basis, or test, which it affords for determining whether given state action is repugnant to the constitutional grant of commercial power; and in the clear and certain line of demarcation which it thus supplies between the "national" and the "local" subjects of commercial regulation, referred to in Cooley v. Port Wardens, but not there explicitly defined.

So important to our present question is this conception of commerce in the strict, or constitutional, sense that it will bear emphasis by further citations.

First, we may refer to several other cases in which Mr. Justice Field, speaking for the whole court, had occasion to define, in similar terms, the commerce committed to federal regulation by the constitution:

> Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347;
>
> Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238;
>
> Escanaba Co. v. Chicago, 107 U. S. 678, 27 L. Ed. 442;
>
> Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. Ed. 158;
>
> Bowman v. Chicago etc. R. Co., 125 U. S. 465, 507, 31 L. Ed. 700.

To this list must be added the decision of the same learned jurist, rendered on circuit, in the Railroad Commission case we have cited. In the latter case, after restating this doctrine and quoting from Mobile County v. Kimball, supra, he continued:

> "*It follows*, from these views, that, with respect to *all* interstate or foreign *commerce*, the railroad commissioners have *no* authority to interfere. Congress has prescribed all the regulations which are permissible, so far as that commerce is carried on in vessels. * * *
>
> "With respect to purely domestic commerce carried on by these vessels, the commissioners possess all the authority which the state can confer. But when can the vessels, in carrying persons and merchandise between different ports in the state, be held to be engaged in commerce purely domestic? for there is a commerce within the state which does not come within that designation."
>
> Pacific Coast S. S. Co. v. Board of R. R. Comm., 18 Fed. 10, 12.

The answer given in that case to the question thus propounded we have already shown, namely: that to make commerce domestic or local, "the subject transported must be within the entire voyage under the exclusive jurisdiction of the state."

Many other members of this court, of course, have given expression to the same fundamental conception of commerce.

Thus, in Railroad Company v. Husen, denying the validity of a statute of Missouri restricting the importation of "Texas cattle," it was said by Mr. Justice Strong, speaking for the court:

> "*Transportation* is essential to commerce, or rather, it *is commerce itself;* and every obstacle to it, or burden laid upon it by legislative authority, is regulation."
>
> Railroad Company v. Husen, 95 U. S. 465, 470, 24 Law Ed. 527.

And so, in holding void a state tax upon interstate telegraph messages, Mr. Chief Justice Waite, speaking for the court, said:

> "A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce and *their business is commerce itself.*"
>
> Telegraph Co. v. Texas, 105 U. S. 460, 464.

Again, in Wabash etc. R. Co. v. Illinois, the earlier cases were reviewed by Mr. Justice Miller, and summing up their effect (with especial reference to the apparent neglect thereof in the so-called "Railroad Commission Cases," 94 U. S. 133 *et seq.*), he said:

> "We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court, that a statute

> of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which *constitutes* a part of *commerce* among the states, is a valid law."
>
> Wabash etc. R. Co. v. Illinois, 118 U. S. 557, 575, 30 L. Ed. 244.

In still another case, speaking again by Mr. Justice Miller, and annuling a state tax on the receipts of interstate transportation, this court said:

> "Where the business so taxed *is commerce itself*, and is commerce among the states or with foreign nations, the constitutional provision cannot thereby be evaded."
>
> Fargo v. Michigan, 121 U. S. 230, 244, 30 L. Ed. 888.

Clear and emphatic to the same point, also, was the opinion delivered by Mr. Justice Bradley for this court in Philadelphia etc. S. S. Co. v. Pennsylvania, where, holding void a tax upon receipts "from the transportation of persons and goods between different states and between states and foreign countries," it was said:

> "This transportation *was an act* of interstate and foreign *commerce*. It was the carrying on of such commerce. *It was that, and nothing else.* In view of the decisions of this court, it cannot be pretended that the state could constitutionally

regulate or interfere with that *commerce itself.*"

Phila. etc. S. Co. v. Pennsylvania, 122 U. S. 326, 336, 30 L. Ed. 1200.

Without tracing this doctrine through all the later decisions of the court, it will be enough to quote the clear statement of it in the opinion delivered by Mr. Justice Van Devanter in the Second Employers' Liability Case. Sustaining the Federal Employers' Liability Law of 1908, the court said (adopting as its own the language of Solicitor General Bowers):

"Interstate commerce—if not always, at any rate when the commerce is transportation—*is an act.* Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce."

Second Employers' Liability Case, 223 U. S. 1, 48.

"THE ACT OF COMMERCE": DISTINCTION BETWEEN MEDIATE AND IMMEDIATE EFFECT OF STATE ACTION UPON FEDERAL COMMERCE.

The phrase of the last two cases quoted (employed also in Gloucester Ferry Co. v. Pennsylvania, supra, 114 U. S. 196, 206), i. e., "the *act* of commerce," further clarifies and completes the conception of the other cases above cited on this point; and they all warrant and require the drawing of a sharp line of distinction between that state action which operates upon the act of commerce *immediately*, and that which operates upon it only *mediately*, being directed primarily against some instrument or agency, or some incident or consequence, of the act of commerce.

This was very accurately stated in the opinion of this court in Hall v. DeCuir (quoted with approval in Wabash etc. R. Co. v. Illinois, 118 U. S. 557, 572), characterizing state action operating immediately upon commerce, in these words:

> "It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without, or goes out from within."
>
> Hall v. DeCuir, 95 U. S. 485, 488; 24 L. Ed. 547.

In the light of these authorities, and others confirming their doctrine, we are enabled, for the purposes of our case, to lay on one side all of the numerous decisions in which this court has sustained state action, dealing primarily with the instruments or incidents of commerce, and only mediately, if at all, with commerce itself. For no decision sustaining state action affecting commerce only thus mediately, or consequentially, can be any authority for sustaining state action which operates immediately upon commerce itself.

Such immediate operation, clearly, is the character of the state action here involved, for it deals, not with any instrumentality of commerce,—such as the railroad cars involved in

Atlantic etc. R. R. Co. v. Georgia, 234 U. S. 280,

nor any human agency of commerce,—such as the locomotive engineers dealt with in

Smith v. Alabama, *supra*, 124 U. S. 465, 31 L. Ed. 508,

nor any mere incident or consequence of commerce, constituting no necessary or integral part of the act of commerce,—such as the liability for negligence of an interstate carrier, involved in

Chicago etc. R. Co. v. Solan, 169 U. S. 133,

but with an *act* of commerce, namely, transportation, which is affirmed in so many decisions to be "commerce itself."

The features which essentially distinguish state action of this latter, from that of the former character, will necessarily be developed as the apposite cases are considered, and need not be dwelt on here.

2—*Regulation in the Constitutional Sense: The Two Types of State Action Affecting Commerce but Not Amounting to Regulation.*

Having thus, we believe, sufficiently exemplified from the decisions what is that "commerce" which the states are inhibited from regulating, we have now to inquire what extent, or manner, of effect upon that commerce, by state action, will constitute a regulation thereof.

The rule is so familiar as to be trite, that state action may affect federal commerce (for brevity's sake we venture to thus, here and elsewhere, paraphrase the expression "interstate and foreign commerce") without constituting a regulation of it.

(I) STATE ACTION AFFECTING COMMERCE, BUT NOT "IMMEDIATELY" (ALREADY DISCUSSED).

(II) STATE ACTION AFFECTING COMMERCE (IMMEDIATELY PERHAPS), BUT NOT "DIRECTLY."

One—and much the most common—species of indirect, or consequential, interference with commerce has already been noted; that, namely, which affects or operates upon commerce only mediately, through control of its instrumentalities or incidents. The cases sustaining state action of this character, as we have said, cannot be invoked to support state action which operates immediately upon commerce itself. It is state action of the latter character, as we think the court will agree, which has presented the most perplexing problems under the commerce clause: for we think it must be admitted that state action of this character having, not mediate, but immediate, effect upon commerce, does not in *all* cases constitute a "regulation" of commerce within the rule in question.

(That our choice of terms here may not be misunderstood, we should point out that what we have designated "immediate" operation or effect is not *always* the equivalent of what the decisions have often termed a "direct" bur-

den or effect. We need not take time, we think, to illustrate this distinction—so far as material, it will develop itself in the course of the discussion. We only wish to make clear the use which we here make of the term "immediate," viz.: to contra-distinguish from that action which, while it affects commerce, does so only through the medium of its effect upon some *agency, incident or consequence* of those *acts* which constitute "commerce itself.")

We may even go farther than the above admission, and concede that it is only as a matter of convenient terminology that the later decisions, almost without exception, have declared that state action of this character, when valid, is not a "regulation" of commerce. In Cooley v. Port Wardens, as we have seen, the court did not feel justified in denying this designation even to state action which affected commerce only mediately, through some of its agencies.

The Primary Test: Valid State Action Must Rest on Some Power Other Than Regulating Commerce.

The truth is, the present terminology is justified by a vital consideration, discerned and stated by Mr. Chief Justice Marshall, as long ago as the decision in Gibbons v. Ogden. This consideration is so important to our subject that

we must quote at length his statement of it, which was evoked by this very question of the relative powers of state and nation under the commerce clause, and the possibility of the latter being held exclusive. (In the reference which he makes, in the course of the statement, to internal commerce, by vessels sailing from port to port of the same state, he is to be understood, doubtless, as speaking of vessels plying only the waters within the jurisdiction of the state, since it may well be doubted if there were then any vessels going upon the high seas en route between ports of the same state. Certainly, at least, there were more whose route, between such ports, was wholly intrastate.) We now quote his resolution of the dilemma arising from the concurrent power of two different governments to act upon the same subject:

> "It is obvious that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. If congress license vessels to sail from one port to another in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a

state, or to act directly on its system of police. So if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

"In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other."

Gibbons v. Ogden, 9 Wheat. 1, 204.

It would be easy to confirm this pronouncement of the great constitutionalist by other cita-

tions, but, for once at least, we will risk our own judgment of what is sufficient in authority and argument, and forbear further proofs.

Applying the principle thus laid down, we discover the primary test for the validity of state legislation which operates immediately upon commerce, namely, that it must proceed from some "acknowledged power" of the state other than a power to regulate federal commerce.

In applying this primary test the court has frequently laid down the rule that state action affecting interstate or foreign commerce is void when it "burdens," or "directly burdens," that commerce.

What is it to "burden" commerce within the meaning of this principle? Without attempting a systematic or exhaustive definition, we are satisfied that the decisions of this court show, in the first place, that to burden federal commerce is to put a restraint upon the freedom of that commerce—which freedom, in innumerable decisions has been declared to be secured by the Constitution, by its own force. Furthermore, such restraint of freedom, as we should naturally expect, and as the decisions show, may be accomplished either by imposing some condition upon, or obstacle to, the exercise of a right of commerce, or by imposing upon those engaged in commerce some additional duty or obligation not previously existing.

PRIMARY TEST APPLIED: THREE TYPES OF VOID STATE ACTION AFFECTING FEDERAL COMMERCE.

The pertinent decisions will be discussed in subsequent divisions of our brief, and it will then appear that they disclose three fairly distinguishable types, or categories, of void state action, affecting federal commerce; and these furnish three distinct tests of the invalidity of such state action, viz.:

(a) Where it imposes a restraint upon commerce greater than necessary to effect the objects of the state power purporting to be exercised.

(b) Where the restraint imposed on federal commerce is itself the object of the state action: e. g., where the object sought by such action is an addition to the obligations of a carrier in the performance of an "act of commerce."

(c) Where the restraint imposed affects the operations of the carrier, or other "actor" in federal commerce, beyond the bounds of the state.

Each of these tests we submit, affords an objection which is fatal to the validity of the rate regulation, herewith attempted, under authority of the state of California.

To justify and illustrate the application of these three tests is our next task. An exhaustive analysis, or even the citation, of all the

decisions of this court sustaining and applying these tests would be practically impossible. We shall not undertake it, but instead, confine our citations under each point to a few of the typical, instructive cases.

C—THREE TESTS BY WHICH ATTEMPTED STATE REGULATION OF INTERSTATE OR FOREIGN COMMERCE MAY BE DETECTED AND ITS INVALIDITY THEREBY DETERMINED.

1—*State Action Although for Valid Purpose, Is Void Where It Imposes Unnecessary Restraint Upon Federal Commerce.*

The leading case here is Railroad Company v. Husen, where a statute of Missouri was involved, prohibiting the bringing in of "Texas cattle" at certain times of the year; concerning which the court said:

> "It seems hardly necessary to argue at length, that, unless the statute can be justified as a *legitimate* exercise of the police power of the state, it is a usurpation of the power vested exclusively in congress."

Discussing the claim that the statute *was* valid, as a police regulation, to prevent the introduction and spread of so-called "Texas fever," it was observed that there was no attempt, or means provided, by the statute for distinguishing between such cattle as were dis-

eased, or dangerous, and such as were healthy and harmless, and further declared:

> "While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the state, *beyond what is absolutely necessary* for its self protection. It may not, *under the cover* of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. * * *
>
> "The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it, *objects not within its scope* cannot be secured at the expense of the protection afforded by the Federal Constitution."

Hannibal etc. R. Co. v. Husen, 95 U. S. 465, 469, 472, 473, 24 L. Ed. 527.

The principle thus laid down was afterwards applied in two closely related cases involving, one a statute of Minnesota, the other a statute of Virginia, each making certain requirements as to the inspection of meats before their sale as food.

While the requirements were apparently quite legitimate and proper as to meats produced

within the state, this court, as to each statute, showed that its effect was to restrict, if not prevent, the importation of meats produced in other states which might be entirely wholesome and fit for consumption. In the former of the two cases, after reviewing previous decisions, including Railroad Co. v. Husen, *supra,* the question for decision was thus stated:

> "Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, *not only* whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, *but* whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."
>
> Minnesota v. Barber, 136 U. S. 313, 320, 34 L. Ed. 455.

In both of the cases referred to the conclusion was against the validity of the statute involved, and in the second case that conclusion was stated thus:

> "We are of opinion that the statute of Virginia, although avowedly enacted to protect its people against the sale of unwholesome meats, has no real or substantial relation to such an object, but, by its necessary operation, is a regulation of commerce, beyond the power of the state to establish."
>
> Brimmer v. Rebman, 138 U. S. 78, 84, 34 L. Ed. 862.

These cases and others of like impression were reviewed by this court in Schollenberger v. Pennsylvania. There, a state statute absolutely prohibiting the manufacture or sale of oleomargarine was held void, as applied to importations from another state, although it had previously been held, by this court, to be a valid exercise of the police power, and of the discretion of the legislature thereunder, as applied to oleomargarine manufactured within the state. We might well quote the whole opinion in that case as an argument, and a conclusive one, for our present point. A brief excerpt (having particular reference to the previous decision of the court on this statute) must suffice:

> "Legislation which has its effect wholly within the state and upon products manufactured and sold therein might be held valid as not in violation of any provision of the Federal Constitution, when at the same time legislation directed towards prohibiting the importation within the state *of the same article* manufactured outside of its limits might be regarded as illegal because in violation of the rights of citizens of other states arising under the commerce clause of that instrument."
>
> Schollenberger v. Pennsylvania, 171 U. S. 1, 16, 43 L. Ed. 49.

A special phase of our present subject, namely, *the imposing of conditions* upon the right to engage in interstate commerce, was recently

re-examined by this court, and the principle of the foregoing cases affirmed in

Barrett v. New York, 232 U. S. 14,

where an ordinance requiring express companies, engaged in interstate commerce, to obtain a city license was held void, although claimed to be necessary as a police regulation.

Application of This Doctrine to the Case at Bar.

The principle of these decisions plainly, we submit, rules the case at bar. That principle is only the express statement of what was implied in the passage above quoted from the decision by Mr. Chief Justice Marshall, in Gibbons v. Ogden: namely, that state action, operating upon interstate or foreign commerce, if valid, must be one proceeding, not from the power to regulate such commerce,—which is delegated to congress,—"but from some other which remains with the state,"—and (for like reasons) must not transcend the legitimate scope of such state power. For otherwise such state action, immediately affecting federal commerce, is, necessarily, a regulation of that commerce, and hence (Railroad Co. v. Husen. *supra*), a "usurpation of the power vested exclusively in congress."

It is true that in the cases above cited, the void regulation of commerce was different *in*

form from that attempted in the case at bar. But there is no distinction *in principle.* Precisely this, in effect, was affirmed in the first of the rate regulation cases which we have heretofore cited, where the court said that it was "impossible to see any distinction in its effect upon commerce" between regulating the charges of transportation and levying a tax upon transportation. Either form of action imposes a restraint upon commerce, which is beyond any power of the state, whatever its purpose.

Wabash etc. Co. v. Illinois, 118 U. S. 557, 570, 30 L. Ed. 244.

Furthermore, in addition to the cases dealing with rate regulation, under state authority, there are others which condemn state action similar in form, as an attempt to regulate the very "act of commerce" comprised in transportation. These will be more appropriately considered under our next head.

2—*State Action Affecting Federal Commerce Void Where ITS OBJECT Is to Restrain or Control Such Commerce.*

The cases now to be considered deal with state action having an effect upon federal commerce very similar to that last discussed, but with a difference which is sufficiently indicated, we believe, in the respective headings of these two divisions of our brief.

POLICE POWER RESPECTING FEDERAL COMMERCE IS VESTED IN CONGRESS, NOT IN THE STATES.

Very instructive upon this point is the decision of this court in Crutcher v. Kentucky. There, a state statute was considered which required foreign corporations, before engaging in the express business, among other things, to produce satisfactory evidence of the possession of $150,000 in capital. This requirement was held void, as applied to corporations engaged in interstate business, notwithstanding it was claimed to be proper, both as prescribing conditions upon which foreign corporations might be admitted to the state, and as a police regulation, to protect citizens of the state from loss, etc. Answering these contentions, the court said:

> "If *the subject* was one which *appertained to the jurisdiction* of the state legislature, it may be that the requirements and conditions of doing business within the state would be promotive of the public good. It is clear, however, that it would be *a regulation of interstate commerce* in its application to corporations or associations engaged in that business; and *that is a subject which belongs to the jurisdiction of the national* and not the state legislature. *Congress* would undoubtedly have the right to exact from associations of that kind any guarantees it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of congress, it is to be presumed

that congress has done, or will do, all that is necessary and proper in that regard."

Crutcher v. Kentucky, 141 U. S. 47, 56-57, 35 L. Ed. 649.

STOPPING OF INTERSTATE TRAINS A DIRECT REGULATION OF COMMERCE, IF LOCAL FACILITIES OTHERWISE PROVIDED.

A very interesting and instructive group of cases of like character are those which have dealt with state legislation, or administrative orders, requiring the stopping, within the state, of trains carrying interstate traffic. Not counting a somewhat similar case from Minnesota, which only affected, however, trains operating wholly within the state, there are some six of these cases, the state action in question being held void in five instances, but valid in the sixth. For the convenience of the court we here cite them all, including the one from Minnesota:

Illinois C. R. Co. v. Illinois, 163 U. S. 142;

Gladson v. Minnesota, 166 U. S. 427;

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285;

Cleveland C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514;

Mississippi R. Commission v. Illinois C. R. Co., 203 U. S. 335;

Atlantic Coast Line R. Co. v. Wharton,
207 U. S. 328;
Herndon v. Chicago, R. I. & P. R. Co.,
218 U. S. 135.

An attentive examination and comparison of these apparently (but only apparently) opposing decisions discloses that the principle distinguishing the cases on the one side from those on the other is the very principle we are here invoking. Perhaps the clearest statement of the distinction was given in the opinion of Mr. Justice Peckham in Atlantic Coast Line Co. v. Wharton, *supra*. There an order of the Railroad Commission of South Carolina was in question, requiring certain through interstate trains between New York and Tampa, Florida, to be stopped at a station in South Carolina. Having considered the previous cases, and the principle of decision established thereby, the court said:

> "That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a state, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates interstate commerce, is void.

"It has been decided, however, that some orders which may cause the stoppage of interstate trains made by state authority may be valid if they do not directly regulate such commerce. Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. Rep. 465. When, therefore, an order made under state authority to stop an interstate train is assailed because of its repugnancy to the interstate commerce clause, the question whether such order is void as a direct regulation of such commerce may be tested by considering the nature of the order, the character of the interstate commerce train to which it applies, and its necessary and direct effect upon the operation of such train. But *the effect of the order as a direct regulation of interstate commerce may also be tested* by considering the adequacy of the local facilities existing at the station or stations at which the interstate commerce train has been commanded to stop. * * *

"Without stopping to consider whether, in view of the character of the trains to which the order before us related, it would not result that the order complained of was a direct regulation of interstate commerce, and testing the subject by the local facilities at the station at which the trains were ordered to stop, we think the railroad company in this case has furnished such reasonable accommodations to the people at Latta as it can be fairly and properly called upon to give, and the order to stop these trains is, therefore, not a valid one."

Atlantic Coast L. R. Co. v. Wharton, 207 U. S., 328, 335.

In the earlier case from Ohio (173 U. S. 285) here referred to, a statute requiring the stopping of interstate trains was sustained on the ground, as indicated in the decision just quoted, that it was a proper provision to secure adequate local facilities. Hence, as further indicated in the Wharton case, *supra*, the action of the state in the Ohio case could be regarded as the legitimate exercise of a power over local affairs and interests; its effect upon interstate commerce not being direct (in the sense in which that term has been used in the decisions of this court), but indirect, or consequential, arising from the fact that the same instrumentality, the railroad line, was employed in both interstate and local transportation. But, as expressly held by the decision in the Wharton case, *supra*, where local requirements have already been satisfied, a statute or order requiring the stopping of additional, interstate trains, can no longer be justified as appropriate state action, upon a subject within its jurisdiction, but is, directly and solely, a regulation of interstate transportation.

INCREASING COMMON LAW OBLIGATIONS AS TO TRACING LOST FREIGHT, FURNISHING CARS, ETC., IS REGULATION OF COMMERCE.

There is still another group of cases involving this same principle, as applied to state ac-

tion, having a similar effect upon the acts of commerce performed in transportation. This group, also, affords the advantage of contrasting decisions upon state actions in striking resemblance as to *external* features. In the first of this group of cases a statute of Georgia was involved, imposing upon the initial carrier of interstate freight, lost in transit by a connecting carrier, the duty of discovering and reporting to the shipper the facts fixing the responsibility for such loss; the initial carrier otherwise being liable for the loss as if upon its own line. This court held the statute void because of the duty it imposed, not otherwise existing, to furnish information of the negligence of other carriers,—distinguishing it, in this regard, from the statute involved in a prior case (169 U. S. 311) which merely enforced a reasonable duty of the carrier to give the shipper full information as to *its own* acts. The court said:

> "The question for us to decide is whether the statute, when applied to an interstate shipment of freight, is an interference with, or a regulation of, interstate commerce, and therefore void. * * *
>
> "This is certainly a direct burden upon interstate commerce, *for it affects most vitally the law in relation to that commerce*, and prevents the exemption provided by a legal contract between the parties from taking effect except upon terms which we hold to be a regulation of interstate commerce. * * *

> "The effect of such a statute is direct and immediate upon interstate commerce, * * * and it is not of that class of state legislation which has been held to be rather an aid to than a burden upon such commerce. * * *
>
> "The power to regulate the relative rights and duties of all persons and corporations within the limits of the state cannot extend so far as to thereby regulate interstate commerce. The police power of the state does not give it the right to violate any provision of the Federal Constitution."
>
> Central of Georgia R. Co. v. Murphy, 196 U. S. 194, 202, 203, 204, 205, 207.

Another case, directly in the same line of decision, dealt with a statute of Texas, which penalized the failure of a carrier to furnish cars for the transportation of freight within a specified time after demand, allowing no excuses for delay except "strikes or other public calamities." The statute was held void, on the authority of Central of Georgia v. Murphy, *supra,* the court saying:

> "We think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state, and amounts to *a burden upon interstate commerce.*
>
> "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unex-

> pected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance. * * *
>
> "Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."
>
> Houston & Tex. C. R. Co. v. Mayes, 201 U. S. 321, 329-32.

Other cases applying this doctrine to very similar state action immediately affecting interstate transportation, and holding such action void, are:

> McNeill v. Southern Ry. Co., 202 U. S. 543,

the facts and decision in which are sufficiently stated in Missouri etc. R. Co. v. Larabee F. & M. Co. (211 U. S. 612), hereinafter quoted, and

> St. Louis S. W. & R. Co. v. Arkansas, 217 U. S. 136,

which involved a statute substantially the same as that in the Mayes case, *supra* (201 U. S. 321).

BUT STATES MAY, BY APPROPRIATE MEANS, ENFORCE COMMON LAW OBLIGATIONS.

The case which we have alluded to as presenting a contrast (but by no means a conflict) with those just discussed, is that of Missouri P. R. Co. v. Larabee F. M. Co.; in the report of which case will be found a very full statement of its facts, by Mr. Justice Brewer, from which we extract the following:

The defendant railroad company (plaintiff in error in this court) had been accustomed to receive upon a "transfer" track connecting its line of interstate railroad with another such line, cars moving in both state and interstate traffic, and deliver them at the mills and elevator of the plaintiff milling company, situated upon the defendant's own lines. A controversy having arisen between the parties over a demurrage charge which the milling company refused to pay, the railroad company was ordered by the railroads' joint car service association to discontinue the transfer service to the milling company, which the railroad company accordingly did, although it continued, as theretofore, to render the same service to all other industries along its tracks, in the same town, which demanded it. Application was then made to the Supreme Court of the state for a mandate directing a resumption of this service to the milling company upon the same terms as

rendered to others in like situation; and judgment to that effect was entered by that court.

After conceding the contention of counsel, that there was *no statute or administrative order of the state* requiring the rendering of such transfer service, this court declared that the duty nevertheless existed under the circumstances of the case, saying:

> "While no one can be compelled to engage in the business of a common carrier, yet, when he does so, certain duties are imposed which can be enforced by mandamus or other suitable remedy. * * *
>
> "It was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others.
>
> "No legislative enactment, no special mandate from any commission or other administrative board, was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers." * * *
>
> "It is further contended that this is not a mere incidental matter, indirectly affecting interstate commerce, but directly a part of such commerce, and therefore beyond the power of the state to control; and in support of that, McNeill v. Southern R. Co., 202 U. S. 543, is referred to. There are many points of resemblance between that case and this, but there is this substantial distinction: In that was presented and determined solely the power of a state commission to make orders respecting the delivery of cars engaged in interstate commerce beyond the right-of-way of

> the carrier and to a private siding,—an order which affected the movement of the cars prior to the completion of the transportation; while here is presented, as heretofore indicated, the question of the power of the state to prevent discrimination between shippers, and the common-law duty resting upon a carrier was enforced. This common-law duty the state, in a case like the present, may—at least, in the absence of congressional action,—compel a carrier to discharge."
>
> Missouri P. R. Co. v. Larabee etc. Co., 211 U. S. 612, 619, 622, 625.

There are, of course, many other cases which have sustained state action on the principle underlying the last cited decision, viz., that it may be competent for the state to exert its power to enforce common law duties of those carrying on interstate and foreign commerce within its limits, and that such state action is not a burden but an aid to commerce. There is no occasion for our attempting to review those cases here. For none of them, when fairly analyzed and understood, weighs at all against the principle we are urging.

The *rationale* of these latter decisions was clearly set forth by Mr. Justice Peckham, delivering the opinion of this court sustaining a statute of Georgia which penalized negligent delay, within the state, in the delivery of interstate telegraph messages. To make plainer the

true bearing of that doctrine upon our present question, we briefly quote:

> "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."
>
> Western Union T. Co. v. James, 162 U. S. 650, 660.

"Acts of Commerce" Governed by Common Law, in Absence of Federal Regulation.

It should further be noted that the proposition implied in both of the cases last cited, and the others in the same line of decision, namely, that the conduct and operations of interstate and foreign commerce are governed by the common law or "general law of the land,"—regardless of any adoption thereof by state au-

thority,—was expressly decided by this court in Western Union Tel. Co. v. Call Publishing Company, where it was said:

> "This court has often held that the full control over interstate commerce is vested in congress, and that it cannot be regulated by the states. It has also held that the inaction of congress is indicative of its intention that such interstate commerce shall be free; and many cases are cited by counsel for the telegraph company in which these propositions have been announced. * * *
>
> "Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of congress? We are clearly of opinion that this cannot be so, and that *the principles of the common law are operative upon all interstate commercial transactions*, except so far as they are modified *by congressional enactment.*"
>
> Western Union Tel. Co. v. Call Publishing Co., 181 U. S. 92, 101, 102.

See also:

> Kansas v. Colorado, 206 U. S. 46, 96.

The doctrine of the decisions above cited, and others referred to,—sustaining state action enforcing the common law duties of interstate carriers—serves only to confirm and give further point to the cases on which we rely. Comparing the one line of decisions with the other,

the principle necessarily deduced therefrom is two-fold, viz.: That, on the one hand, a state may (with qualifications which do not seem material here), where it has territorial jurisdiction over the persons and subjects concerned, provide additional sanctions for common law obligations appertaining to acts of federal commerce; but that, on the other hand, it cannot make any substantial addition to or alteration of such obligations. The latter branch of this rule may not, in just these terms, have been announced in any of these cases, but it is, we submit, the necessary result of them all.

APPLICATION OF DOCTRINE: STATE CANNOT REGULATE INTERSTATE TRANSPORTATION RATES UNDER POLICE POWER.

Whether or not what we have last said rightly epitomizes the decisions on our present point, there can be no doubt, we submit, that the principle of those decisions, however it be formulated, conclusively determines the invalidity of the state action here in question: since those cases demonstrate that action of the very character here attempted by the state of California is a regulation of commerce which only congress has power to adopt.

If, perchance, it should be claimed that fixing the charges for the transportation involved in the case at bar might be held valid as a police

regulation, the answer is directly made by the decisions we have here adduced, and many others. For

> "The decisions also show that a state cannot avoid the operation of this rule by the simple and convenient apologetics of the police power. It repeatedly has been said, or implied, that a direct interference with commerce among the states could not be justified in this way."
>
> Kansas C. S. R. Co. v. Drainage District, 232 U. S. 494.

> "The power to regulate the relative rights and duties of all persons and corporations within the limits of the state cannot extend so far *as to thereby regulate interstate commerce*. The police power of the state does not give it the right to violate any provision of the Federal Constitution."
>
> Central of Georgia R. Co. v. Murphey, *supra*, 196 U. S. 194, 207.

If it be true, and we do not dispute it, that the regulation of charges for public service generally, including transportation, is an exercise of the police power, then it must also be true, that, as to interstate and foreign commerce, that branch of the police power has been delegated to congress, and denied to the states, by the commerce clause of the Federal Constitution. Indeed, as we have shown, this was affirmed, almost in so many words, in Crutcher

v. Kentucky *supra* (141 U. S. 47, 56) and it is implicit in all the cases on our present point. Hence the conclusion we here urge, that the action of the state now in question is void, because no power, other than a power to regulate foreign commerce, will support it, and *that* power the state of California does not possess.

This, we submit, is the necessary effect of the decision in all, and very obviously in the last, of the rate regulation cases we have cited (Railroad Commission v. Worthington). For the state action there in question was the prescription of a rate to be charged for the transportation of coal, by a railroad, *wholly within the state*. But the rate only applied to coal, which, at the end of such railroad transportation, was transferred to vessels bound to lake ports of other states, and the rate in question embraced the service of loading the coal onto the vessels for such extra-state transportation. Notwithstanding the ultimate destination of the coal was not determined until after the movement by rail had been completed —a different rate being applied where the coal so moved by rail finally remained in the state— this court held the rate, applied to the coal loaded upon outbound vessels, to be void, saying:

> "It is enough to now hold, as we do, that the establishing of the rate in ques-

> tion is an attempt to regulate interstate commerce, and is therefore beyond the power of the state or a commission assuming to act under its authority."
>
> Railroad Commission v. Worthington, 225 U. S. 101, 111.

That case, therefore, presents a perfect example of state action which is void because its very purpose is to create a new duty for a carrier engaged in federal commerce; and it is, likewise, a precedent exactly in point for the case at bar.

CONTRASTING CASES, SUSTAINING STATE ACTION AFFECTING, BUT "NOT DIRECTED AGAINST," FEDERAL COMMERCE.

The significance of the cases we have treated in this division of our brief is brought into stronger light by contrasting them with the several decisions in which this court has sustained state action, affecting federal commerce, on the ground that it was *not directed*, or *not "aimed,"* against such commerce. One of the earliest of this latter type of cases is that of Sherlock v. Alling, wherein a statute of Indiana was held valid, which gave a right of action for wrongful death, as applied to the negligence of a carrier engaged in interstate commerce.

> Sherlock v. Alling, 93 U. S. 99, 104, 23 L. Ed. 819.

One of the more recent cases presenting state action of this type involved a statute permitting levying of an attachment upon railroad cars of interstate carriers. Concerning the reasons for sustaining such statutes, this court there said:

> "It is very certain that there is no conscious purpose in the laws of the states to regulate directly, or indirectly, interstate commerce."
>
> Davis v. Cleveland C. C. & S. R. Co., 217 U. S. 157, 177.

There are many cases of like impression; but, as we have said, they serve only to make clear the principle of the decisions upon which we have here relied, and its conclusive application to the case at bar. For there can be no doubt that the legislation of California, here in question is expressly "directed against" the species of foreign commerce in which plaintiff in error is engaged. (See provisions of "Public Utilities Act" quoted in the Record, at folio 38.) The provision of this statute, explicitly subjecting all transportation upon the high seas, between different ports of the state, to regulation by the defendant Commission, makes clear and undeniable its unlawful purpose to regulate this much of federal commerce, if that could otherwise be doubted.

3—*State Action Affecting Federal Commerce Beyond Bounds of State Is a Void Regulation Thereof.*

THE LEADING CASE: HALL v. DECUIR.

The language of the leading case, Hall v. DeCuir, is so apt and convincing, both upon this point and that which we last discussed, that we must quote from it. That case, it will be remembered, involved a statute of Louisiana, requiring, in effect, that carriers by water furnish the same accommodations to all passengers, without discrimination as to color. Said Mr. Chief Justice Waite, speaking for the court:

> "We think it may be safely said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. * * *
>
> "As was said by Mr. Justice Field, speaking for the court in Welton v. Missouri, 91 U. S. 282, 'Inaction (by congress) is equivalent to a declaration that

interstate commerce shall remain free and untrammeled.' Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. *If the public good requires such legislation, it must come from congress and not from the states.*

"We confine our decision to the statute in its effect upon foreign and interstate commerce, expressing no opinion as to its validity in any other respect."

Hall v. DeCuir, 95 U. S. 485, 487, 24 L. Ed. 547.

Doctrine Applied in Rate Regulating Cases.

This doctrine was early and explicitly recognized in Stone v. Farmers' Loan & Trust Co. There the constitutionality of legislative regulation of *intra*state rates was affirmed, indeed, but

only on the ground that: "Legislation of this kind, to be *un*constitutional, must be such as will necessarily amount to or operate as a regulation of business *without the state* as well as within."

Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 335, 29 L. Ed. 636.

The next decision in this line is the earliest of the *inter*state rate regulating cases, already cited, where the court expressly relied upon the principle laid down in Hall v. DeCuir. It also referred to and affirmed, as we have seen, the doctrine of Mobile County v. Kimball and other cases, *supra*, declaring that all commerce, in the strict definition of the term, which embraces all transportation, transcending state boundaries, is of national concern and requires regulation by the single national authority; and the opinion of the court, delivered by Mr. Justice Miller, summed up the whole matter thus:

> "That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by

general rules and principles which demand that it should be done by the congress of the United States under the commerce clause of the Constitution."

Wabash, St. L. & Pac. R. Co. v. Illinois, 118 U. S. 557, 577, 30 L. Ed. 244.

DOCTRINE APPLIED IN OTHER ANALOGOUS CASES.

Again, in Western Union Teleg. Co. v. Pendleton, this court, in assigning its reasons for holding void a statute of Indiana, penalizing the failure to promptly deliver in *another* state a telegraph message originating in *that* state, cited both of the above cases, with others declaring the exclusiveness of federal power; and of the statute before it in that case, and its effect upon commerce by telegraph, said:

"It is an impediment to the freedom of that form of interstate commerce, which is as much beyond the power of Indiana to interpose as the imposition of a tax by the state of Texas upon every message transmitted by a telegraph company within her limits to other states was beyond her power. Whatever authority the state may possess over the transmission and delivery of messages by telegraph companies *within her limits*, it does not extend to the delivery of messages *in other states*."

Western Union Telegraph Co. v. Pendleton, 122 U. S. 347, 358, 30 L. Ed. 1187.

The last case was distinguished in Western Union Teleg. Co. v. James, *supra,* where, after reviewing at length all of the case above cited on this head, and approving their doctrine, the statute then before the court was thus distinguished:

> "No attempt is here made to enforce the provisions of the state statute beyond the limits of the state, and no other state could by legislative enactment affect in any degree the duty of the company in relation to the delivery of messages within the limits of the state of Georgia."
>
> Western Union Teleg. Co. v. James, 162 U. S. 650, 662.

This court, in a case decided at the last term, in refusing to enforce liability, under a statute of South Carolina, for failure to deliver a telegraph message in the District of Columbia, approved and followed the Pendleton case, *supra,* declaring that it was "in no way qualified by Western U. Teleg. Co. v. Commercial Mill. Co., 218 U. S. 406" (which latter case approved and applied the doctrine of the James case, *supra*).

Western Union Teleg. Co. v. Brown, *supra,* 234 U. S. 542.

This recent and positive adherence to the principle we are now invoking forecloses further discussion, and we therefore merely repeat here our citation of the other cases specifically

holding attempted state regulation of rates, for transportation beyond its boundaries, to be void as a regulation of commerce.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. Ed. 962;

Smyth v. Ames, 169 U. S. 466, 541;

Louisville & N. R. Co. v. Eubanks, 184 U. S. 27;

Hanley v. Kansas etc. R. Co., *supra*, 187 U. S. 617;

See also:—

Railroad Comm. v. Worthington, *supra*, 225 U. S. 101.

It only remains to again emphasize the point that the principle of the foregoing decisions applies to the fixing of rates for transportation upon the high seas, although between ports of the same state, as explicitly determined in

Pacific Coast S. S. Co. v. Railroad Comm., 18 Fed. 10,

which case was approved, and the same underlying principle applied, in

Hanley v. Kansas etc. R. Co., *supra*, 187 U. S. 617.

CONFLICT OF STATE ACTION NOT ONLY GROUND OF THE DOCTRINE.

The last cited case (as well as Railroad Comm. v. Worthington, *supra*) is specially sig-

nificant, as we have already shown, because, like the case at bar, it did not involve any possibility of conflicting regulations by different states. In those cases, however, as in this, there *was* involved a subject-matter inherently incapable of division between two jurisdictions, and therefore requiring regulation by one authority; and that authority, as the court concluded, must be the federal rather than the state, on the familiar principle governing all cases of conflicts between those powers.

That the possibility of conflicting regulations by different states was not the only ground of decision in the other cases cited is already apparent from the quotations we have made therefrom. The evils of conflicting regulation were indeed suggested in some of the cases as a reason for the decision; but not so much, it is evident, as a ground for holding void the particular form or attempt at regulation under consideration, but rather as demonstrating that the Constitution must have intended that the federal power conferred by the commerce clause should be an exclusive power. We do not believe it has ever been intimated by this court that such exclusiveness only obtained in cases where there was a possibility of conflict between regulations of the different states; on the contrary, it is evident from the citations we have heretofore made that the rule of exclusiveness has

frequently been asserted and enforced as to state action where there was no possibility of such conflict,—notably those cases in which the state action in question was confined in its operation within the territorial limits of the state, but was, nevertheless, held void as being outside of any "acknowledged power" of the state.

Another sufficient reason for concluding that the possibility of conflicting state legislation was not the only ground of declaring the federal power exclusive, is that such ground, of itself, would not have supported that conclusion; since, to prevent the evils of such conflicts it would be enough that the federal government should have a paramount, though not exclusive power, being thereby enabled to supersede and annul conflicting state regulations. And this has been explicitly held by this court, as to state action operating, not immediately upon commerce itself, but only mediately through control of an instrumentality of such commerce, viz., locomotive headlights.

Atlantic etc. R. Co. v. Georgia, 234 U. S. 280.

On this point we must again call the court's attention to the concurring opinion of Mr. Justice Johnson in Gibbons v. Ogden, where he very clearly shows that it was sought by the adoption of the commerce clause to free inter-

state and foreign commerce from *any* control by the states, and to vest its regulation *solely* in congress.

Gibbons v. Ogden, 9 Wheat 1, 222 *et seq.*, 226.

STATE JURISDICTION UPON HIGH SEAS FOR SOME PURPOSES, BUT NOT FOR REGULATION OF COMMERCE.

Some contention was made on behalf of the Railroad Commission in the court below, based on the decisions affirming the extension of the sovereign jurisdiction of the states to comprehend the rights and duties of its citizens sailing the high seas, on board of vessels having their domicile in the state. We are certain, however, that none of this line of cases has ever sustained the action of any state amounting to a regulation of commerce, within the meaning of those terms as defined by the decisions which we have adduced. Indeed, we submit, it is impossible that the state should have any authority over its citizens or vessels upon the high seas superior to that which it may exert within its territorial bounds

The true doctrine with regard to such extension of state jurisdiction, as it may affect interstate or foreign commerce, must be, we submit, that while the several states have the rights and powers of sovereign nations as to

all matters which have not been surrendered to the federal government, yet, as to matters of the latter class—and this necessarily includes all interstate and foreign commerce—the states have no such sovereign rights or powers, and there cannot be accorded to them any extra-territorial jurisdiction in relation thereto.

4—*Distinguishing Port Richmond Co. v. Freeholders, 234 U. S. 317.*

We have now to consider whether the decision of this court, at the last term, in Port Richmond Ferry Company v. Freeholders, sustaining the right of the state of New Jersey to fix rates for ferriage, from its shore to New York, has overruled or modified the doctrine of the numerous cases we have cited on the question of the exclusiveness of the federal power over commerce.

THE CONTROLLING CONSIDERATION: PORT RICHMOND CASE DEALS SOLELY WITH FERRY TRANSPORTATION.

That case dealt solely with the regulation of charges for transportation by ferry. Everywhere throughout the opinion of the court this point is emphasized. Thus, on page ... of the official report, it was distinctly asserted:

> "The question is still one with respect to a *ferry*, which necessarily implies transportation for a short distance, almost invari-

> ably between two points only, and unrelated to other transportation." (The italics are the court's.)
>
> Port Richmond Ferry Co. v. Freeholders, 234 U. S. 317.

The transportation of the plaintiff in error is not a ferry as thus defined, or under any other definition. The contrary, we are sure, will not be claimed by the learned counsel for defendant in error. If, then, we have convinced the court that the necessary result of all its prior decisions is that other forms of transportation, such as that of the plaintiff in error, can be regulated by congress alone, and not by any state, this is a sufficient ground for distinguishing the decision in the Port Richmond case.

We apprehend, however, that counsel for the defendant in error will not be ready to forego the contention that the opinion rendered in the Port Richmond case has declared a test for determining what is and what is not a regulation of commerce, different from, and inconsistent with, the test we have here claimed as established by the prior decisions of this court. We will therefore inquire how far this more or less plausible contention is sound, and what effect, if any, it may have upon the decision of the case at bar.

It will be granted that the *language* of this decision, as of all others, must be read in the

light of the facts of the case decided, and cannot be deemed authority for any case essentially different in its facts. The essential fact of the case, which the opinion of the court, by expression as well as implication, shows to have been regarded as controlling was that above indicated, viz., that the transportation regulated was that of a ferry "unrelated to other transportation."

But the reason why this fact was regarded as controlling is also of decisive importance. That reason, as very ably developed in the opinion of Mr. Justice Hughes in that case, is undoubtedly to be found in the legislative and judicial history of the subject-matter of ferries and their regulation, especially as that history centers about the decision of this court in Conway v. Taylor (1 Black 603).

CONWAY V. TAYLOR: FERRIES CANNOT BE OPERATED FROM SHORE OF STATE WITHOUT ITS CONSENT.

In Conway v. Taylor, this court sustained the right of the state of Kentucky to grant an exclusive franchise for the operation of a ferry *from* the Kentucky shore to Ohio; that is to say, a judgment of the state court was there affirmed, which enjoined the defendant,—although holding a franchise or license from the state of Ohio to operate a ferry from the shore of

that state,—from *ferrying from* any point on the Kentucky shore embraced in the plaintiff's exclusive franchise. The state court itself had held that it could not enjoin the defendant from ferrying *from* the *Ohio* shore, although his passengers and freight were landed upon the tract of the Kentucky shore covered by the plaintiff's exclusive franchise.

The *legal* basis for this distinction between the ferriage *from* and the ferriage *to* the shore of the state granting the franchise was thus tersely stated, in affirming the right of each state to grant an exclusive franchise for a ferry from its own side (1 Black 629):

> "The concurrent action of the two states was not necessary. '*A ferry* is in respect of the *landing place*, and *not of the water*. The water may be to one, and the ferry to another.' 13 Viner's Ab., 208, A."

THE RULE NOT APPLICABLE TO FERRIAGE FROM OPPOSITE SHORE.

The court was further careful to define the right granted by the state, thus (1 Black 631):

> "The franchise is confined to the transit *from* the shore of the state. The same rights which she claims for herself she concedes to others. She has thrown no obstacle in the way of the transit from the states lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation, and of

> no complaints, by any of those states. It was shown in the argument at bar that similar laws exist in most, if not all, the states bordering upon those streams. They exist in other states of the Union bounded by navigable waters."

Answering the objection that to recognize even such limited right of the state in granting exclusive ferry franchises was a violation of the commerce clause of the federal Constitution, the court said (1 Black 634):

> "Rights of commerce give no authority to their possessor to invade the rights of property. He cannot use a bridge, a canal, or a railroad without paying the fixed rate of compensation. He cannot use a warehouse or vehicle of transportation belonging to another without the owner's consent. No more can he invade the ferry franchise of another without authority from the holder. The vitality of such a franchise lies in its exclusiveness. The moment the right becomes common, the franchise ceases to exist.
>
> "We have shown that it is property, and, as such, rests upon the same principle which lies at the foundation of all other property."

Nor as to Any Other Form of Transportation Than Ferries.

It is most important to observe, also, that it was very distinctly held that the monopoly granted by such exclusive franchise could not, consistently with the federal commerce clause,

extend to restrain transportation of persons or property, *even between the very same places served by the ferry,* by other modes of transportation; as to which, the court said (1 Black 632):

> "The counsel for the appellant insists that, 'as respects transportation from the Kentucky side, and from the Commodore's wharf at the foot of Monmouth street, that vessel is enjoined, under "all or any circumstances, from transporting persons or property" to the opposite shore, unless under the authority of the state of Kentucky.'
>
> *"We do not so understand the decree. If we did, we should, without hesitation, reverse it.* * * * That the appellants had the right after as before the injunction, in the prosecution of the carrying and coasting trade, and of ordinary commercial navigation, to transport 'persons and property *from* the Kentucky shore, no one, we apprehend, will deny. The limitation is the line which protects the ferry rights of the appellees. * * *
>
> "The Commodore was run openly and avowedly as a ferry boat; that was her business. The injunction as to her and her business was correct."

Finally, regarding the right of the states to regulate ferries which they are thus authorized to establish, the court said:

> "There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its

> birth, the states have exercised the power to establish and regulate ferries; congress never. We have sought in vain for any act of congress which involves the exercise of this power."
>
> Conway v. Taylor, 1 Black 603, 635.

IMMATERIAL WHETHER CONWAY V. TAYLOR RIGHTLY DECIDED: STRONG CASE FOR STARE DECISIS.

Whether the foregoing case was rightly decided, it is not necessary here to determine. But it must be remembered that the case of Cooley v. Port Wardens (referred to by the court in Conway v. Taylor) was, we believe, the only prior case in which the exclusiveness of the federal commercial power, in any respect, had been affirmed by any decision, or opinion, delivered by a majority of this court. It would be not at all strange then, especially in view of the prior controversy concerning the question of exclusiveness, if this decision should be found out of line with the subsequent development of the law. (This may be emphasized by referring to the case of Osborne v. Mobile, 16 Wall. 479, which was overruled in Leloup v. Mobile, 127 U. S. 640, at page 647; and the case of State Tax on Ry. Gross Receipts, 15 Wall. 284, which was practically overruled in Phila. etc. S. S. Co. v. Pennsylvania, 122 U. S. 326, 341 *et seq.*)

But the vital considerations respecting the decision in Conway v. Taylor, we submit, are not whether it was rightly or wrongly decided, but that it was decided; and the further fact that the court there, in positive terms, declared that its decision was in accord with the practical construction given to the Constitution, as affecting ferries, by congress as well as the states, for three-fourths of a century; and the still further fact that, with the sanction of this decision, and of the continued inaction of congress upon the subject, the practice of the states to grant ferry franchises and regulate the charges thereof, had been continued down to the time of the establishment of the rates, under consideration in the Port Richmond Ferry case—all of which considerations are adequately and forcibly set forth in the opinion delivered in that case.

In view of this long settled state of the law, specifically dealing with ferries and their regulations, there can be no doubt that the *decision* in the Port Richmond Ferry case was the right solution of the problem there presented. But, as will be conceded, it does not necessarily follow that all the reasons assigned for that decision were essential to it, or are entirely consistent with the doctrine of the previous cases. This court, we are sure, will appreciate the embarrassment which we experience in contending

that there is an inconsistency between any of the *dicta,* even, of an opinion, delivered on behalf of this court, in so recent a case, and the rules of decision settled by many prior cases. Nevertheless we deem it a duty of counsel, owing, not only to the client but to the court, to ask, when occasion requires it, a reconsideration of what may have been said upon such questions as this, and to correct the error, if any be shown; and we feel very strongly that such an occasion now has arisen.

There are three points only, of the opinion in question, which we would thus ask the court to reconsider. The first is, the interpretation, or application, which the opinion gives to the distinction between those matters relating to commerce, which are local, and therefore under the control of the states until congress acts, and those which are national and subject only to national regulation.

Is Dictum in Port Richmond Case as to "Local Affairs" Consistent with Prior Decisions?

It would serve no purpose to repeat here our argument and citation of authorities upon this point, exhibiting what, in the course of forty years or more of adjudication, has become the settled rule of decision. If we have not already made our contentions in that regard plain and

convincing, we know not how to do it. The inconsistency which we see between the present and the prior cases is principally, and briefly, that none of those prior cases has admitted any form of commercial regulation to be within the power of the state unless its effect be confined within the teritorial boundaries of the state. On the contrary, an examination of the cases which have sustained state action, in various forms, affecting federal commerce, will disclose that they all, at least impliedly, and some of them expressly, concede this territorial limitation upon the authority of the states in respect to commerce. It is manifestly out of the question to here review all of those cases; but it may be enough to substantiate our point to quote the express admissions made in this regard by typical cases sustaining state action, which were relied upon by counsel for the Railroad Commission in the court below.

TERRITORIAL LIMITATION ON POWER OF STATES: CONCEDED BY CASES SUSTAINING STATE ACTION.

> "It is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports *within their limits.*"
>
> Cooley v. Port Wardens, 12 How. 299, 319, 13 L. Ed. 996.

"The legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens *within its territorial jurisdiction*, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

Sherlock v. Alling, 93 U. S. 99, 103-4, 23 Law Ed. 819.

"The case is clearly within the principle of the former decisions of this court, which affirm the right of a state, in the absence of regulation by congress, to establish, manage and carry on *works and improvements of a local character*, though necessarily more or less affecting interstate and foreign commerce."

Ouachita Packet Co. v. Aaken, 121 U. S. 444, 447, 30 Law Ed. 976.

"*These cases all proceed* upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons *within the jurisdiction of a state* belongs primarily to such state under its reserve power to provide for the safety of all persons and property *within its limits.*"

Missouri etc. R. Co. v. Haber, 169 U. S. 613, 635.

[In Western Union T. Co. v. Pendleton (122 U. S. 347), the statute involved was] "held an attempt to regulate the

method of delivery *outside of the state, and therefore* an interference with and regulation of interstate commerce."

Western Union T. Co. v. Crovo, 220 U. S. 364, 370.

* * * "That large class of regulations which it is competent for the state to make, in the absence of legislation by Congress, *growing out of the territorial jurisdiction of the state* over such carriers, and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed *within its limits*, although interstate commerce may be indirectly affected."

Adams Express Co. v. Croninger, 226 U. S. 491, 500.

"In other matters admitting of diversity of treatment, according to the special requirements of local conditions, the states may act *within their respective jurisdictions* until Congress sees fit to act."

Simpson v. Shepherd, 230 U. S. 352, 399.

ALL OTHER DECISIONS DENY POWER OF STATE TO REGULATE TRANSPORTATION, AS TO RATES OR OTHERWISE, OUTSIDE TERRITORIAL LIMITS.

We have limited ourselves above to showing express admissions of our contention by the opinions in the cases cited. But if the *facts* of these cases, and all other cases which were, or may be, cited for defendant in error, are ex-

amined, they will be found consistent with the same principle. Especially, and most earnestly, do we insist that the authority of the state *to regulate rates*, for *any* transportation of goods or persons extending beyond the boundaries of the state, has never been admitted, but, on the contrary, has been repeatedly denied by the decisions of this court. And while there may be *other* adequate grounds for excepting from this general rule the particular case of transportation by ferry, we submit that such exception cannot, consistently with the settled rule of decision in prior cases, be justified on the ground, (apparently assumed in the opinion in the Port Richmond case), that the regulation of rates for transportation between the territory of one state, and any outside territory or jurisdiction whatever, may be a "local" affair, or one which does not admit of "uniformity in the plan or system of regulation" within the meaning of the rule laid down by the decisions in this regard. For we repeat, no such extra-state transportation has ever before been admitted to be a local affair, or subject to state regulation,—whatever its mode (if not a ferry), or however short its route (Covington etc. Bridge Co. v. Kentucky, *supra*). The cases to the contrary are overwhelming in number and weight, as we believe we have shown.

In the case of Crandall v. Nevada, this distinction between national and local commercial matters was, *arguendo,* conceded the same meaning apparently ascribed to it in the Port Richmond case; but we have been unable to find any other instance of such interpretation.

And in Crandall v. Nevada, as will be remembered, the statute involved, which levied a head tax upon all inbound and outbound interstate passengers, was held void, though not as a violation of the commerce clause.

> Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745.

There can be no doubt, we submit, that such a statute would today, be unhesitatingly pronounced void as a regulation of federal commerce. In fact, as we shall later show, that case itself has been usually treated as so holding.

It may be asked, how could the state action in question in the Port Richmond ferry case have been sustained—as we admit it should be —without running counter to the principle of decision affirmed in the cases we have cited in former portions of this brief, and conceded, at least, in the citations just made from cases relied upon by defendant in error?

STARE DECISIS REQUIRED ADHERENCE TO DOCTRINE OF CONWAY V. TAYLOR.

To this question we would answer, in the first place, that the decision in Conway v. Taylor, *supra*, in view of the subsequent course and practice of state legislation, under its sanction (not to mention the previous practical construction of the constitution by both states and congress), required that state authority to regulate this particular and peculiar form of interstate transportation should be sustained, even if this ruling were not logically and completely consistent with the general principle applicable to all other forms of transportation. A like situation has been presented by the decisions of this court to the effect that insurance did not constitute commerce, followed by the state legislation which it justified; and in the recent case dealing again with that subject, this court, referring to the previous decisions and the course of legislation thereunder, said:

> "For over forty-five years they have been the legal justification for such legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the states, and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision."
>
> New York Insurance Co. v. Deer Lodge County, 231 U. S. 495.

DECISION IN PORT RICHMOND CASE RECONCILED WITH PRIOR DECISIONS BY PECULIAR LAW OF FERRIES.

We believe, further, that any *apparent* inconsistency between the decision in the Port Richmond ferry case, *supra*, and the prior decisions of this court, with respect to the extent of state authority affecting matters of commerce, will disappear when due weight is given to the peculiar nature of the legal right to carry on ferries, as developed in Conway v. Taylor, *supra*, and the other decisions of this court upon the same subject referred to in the opinion in the Port Richmond case.

The essential point in the law of ferries declared by these decisions is that no one can have a legal right to conduct a ferry without the consent, not only of the owner of the landing place, but also of the state having territorial jurisdiction of that place,—and this, notwithstanding the ferry operates between points in two different states.

GENERAL RIGHT TO CONDUCT COMMERCE MAY NOT COMPREHEND SPECIAL MODE OF FERRIES.

This right of the state to withhold its consent to the carrying on of an interstate ferry was expressly held by the decision in Conway v. Taylor, *supra*, not to extend to any other

form of interstate transportation. In brief, then, the doctrine of that case is: There is an undeniable right, without the consent of the state, to carry on interstate transportation, but not to carry it on by the particular mode of a ferry. This brings the case within an exception to the general rule as to the rights of federal commerce recognized in several decisions of this court. Thus, in Brown v. Maryland, Mr. Chief Justice Marshall, speaking of sales by public auctioneers, said:

> "The right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the state to make sales in a peculiar way."
>
> Brown v. Maryland, 12 Wheat. 419, 443, 6 L. Ed. 678.

This doctrine was approved in

> Emert v. Missouri, 156 U. S. 296, 313;
> Schollenberger v. Pennsylvania, 171 U. S. 1, 23.

If the doctrine of the decisions just cited is sound, and we believe that it has not been denied in any other decision of this court, it seems clearly to sustain, in the case of ferries, an exception to the general rule of non-interference by state authority with federal commerce, and to sanction state regulation of such commerce by the special mode of ferries.

GLOUCESTER FERRY CASE: PECULIAR LAW OF FERRIES RECOGNIZED, BUT HELD NOT APPLIED IN PENNSYLVANIA.

It may be argued that to decide the Port Richmond Ferry case on the ground just suggested would clash with the decision of this court in Gloucester Ferry Co. v. Pennsylvania, *supra*, (114 U. S. 196), where it was held that the state could not levy a tax upon the business of an interstate ferry. In answer, it is to be observed, first, that the ground of decision which was apparently taken in the opinion which has been rendered in the Port Richmond ferry case is equally subject to this objection, unless the court is to overrule its explicit decisions that there is no distinction, in its effect upon interstate transportation in general, between a tax upon such transportation and a regulation of the charges thereof. See, *e. g.*

Wabash etc. R. Co. v. Illinois, 118 U. S. 557, 570.

In the second place, however, it may be a valid distinction between the Port Richmond ferry case and the Gloucester ferry case, *supra*, that the tax involved in the latter was one sought to be imposed by a general statute of the state, applicable equally (if at all) to all forms of interstate transportation, and hence was not, properly speaking, an attempt to exer-

cise the special and peculiar right of the state in regard to ferry transportation. Precisely this distinction, as we understand it, was expressed by Mr. Justice Field, in that case; for he there said:

> "*Pennsylvania has never attempted to exercise* its power of establishing and regulating ferries across the Delaware River. *Anyone, so far as her laws are concerned, is free,* as we are informed, *to establish such ferries as he may choose. No license* fee is exacted from ferry-keepers. She merely exercises the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question, therefore, respecting the tax in *the present case is not complicated by any action of that state concerning ferries.*"
>
> Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 217, 218, 29 L. Ed. 158.

This distinction, we submit, is sufficient, at least, to justify applying the rule of *stare decisis* to support proper regulation of the business of interstate ferries, when strictly confined to that special and peculiar subject, as it clearly was in the Port Richmond case.

Exception may possibly be taken to our statement above, that the decision in the Port Richmond case (unless supported by the distinction just suggested, or possibly some other which has not occurred to us) is contrary in principle to the decision in Gloucester Ferry Co. v.

Pennsylvania, because in the latter decision, rendered by Mr. Justice Field, he expressly conceded the power of the states to make police regulations concerning ferries. But we are confident that a careful reading of that decision will show that he had reference only to the character of police regulations which it is competent for the state to make concerning the operators, vehicles, etc., of all classes of interstate transportation,—or else that he had in mind only the exceptional case of ferries. It is very persuasive of this, we submit, that it was Mr. Justice Field, also, who, at circuit, squarely decided (only one year previous to the decision of the Gloucester Ferry case) that the rates for water transportation between ports of the same state, over a route extending upon the high seas, are not subject to regulation by the state.

Pacific Coast S. S. Co. v. Railroad Comm., *supra*, 18 Fed. 10.

COVINGTON BRIDGE CASE: DISTINGUISHED FROM PORT RICHMOND CASE.

The case of Covington etc. Bridge Co. v. Kentucky (154 U. S. 204) is readily distinguished from the Port Richmond ferry case in that the Covington case involved an interstate bridge, not a ferry. We are not aware of any decision applying to bridges the peculiar rules

of law which have been established as to ferries, and which were the basis of decision in Conway v. Taylor, *supra*.

We must, however, respectfully differ from the intimation of the opinion in the Port Richmond case, that the Covington Bridge case only decided the incompetency of either of the states concerned to prescribe a *round-trip* rate. To the contrary, we feel compelled to submit, but most respectfully, are the grounds of decision actually taken in the Covington Bridge case, as shown by the authorities cited, and especially by the considerations adverted to by the court on pages *221* and *222* of the official report, and by the fact that no suggestion was made that any portion of the statute was valid, notwithstanding the indictment before the court (154 U. S. 205) alleged—presumably in separate counts—violations of portions of the statute which must have been held valid on the theory of that decision which we are now, with the utmost deference to its distinguished author, endeavoring to controvert.

RIGHT OF REGULATION IMPLIEDLY, IF NOT EXPRESSLY, RESERVED IN EVERY GRANT OF FERRY RIGHTS.

We have noted how very carefully the court in Conway v. Taylor, *supra*, (1 Black 603) defined and restricted the extent of the ferry fran-

chise or right which it there held to be grantable by the state. First, it was restricted wholly to ferriage *from* the shore of the granting state; second, it was confined strictly to ferriage, and all other modes of transportation were expressly excluded from ferry privileges. Now, as held in the New Jersey decision, quoted at length in the Port Richmond case, the right to regulate appears to have been predicated, necessarily, upon the authority of the state to grant or withhold permission to operate the ferry. So that the right of the state to regulate the rates may fairly be regarded as a condition always implied, if not expressed, in the grant of the ferry privilege, and as being, unavoidably, a part of the consideration for the grant. We apprehend that no violation of the commerce clause would be perceived in allowing such a reserved right of regulation to be exercised by the state, at least until congress should have taken control of the matter. We are not aware whether this precise question has been decided by this court in any case other than that of Baltimore & Ohio Railroad Company v. Maryland; but that case is perhaps sufficient authority to the point, (although the opinion rendered therein, upon some of the other points discussed, is doubtless not the law today).

Baltimore & Ohio R. Co. v. Maryland,
21 Wall. 456, 22 L. Ed. 678.

The general doctrine laid down by the above decision appears to have been approved in several cases. See

Ashley v. Ryan, 153 U. S. 436, 333, 38 L. Ed. 773;

Louisville etc. R. R. Co. v. Kentucky, 161 U. S. 677, 703;

and we do not understand there is anything contrary to that doctrine in

Western Union Tel. Co. v. Kansas, 216 U. S. 1.

Moreover, this doctrine would seem to be entirely analogous to the familiar rule which permits exercise of the reserved right of altering corporate charters,—a right which, of course, does not exist *unless* reserved.

The restriction of this peculiar power of the state over ferries to ferriage *from* its shore, also, obviates the *practical* difficulty which might otherwise arise from conflict with regulations by other states; a circumstance sufficiently emphasized both in Conway v. Taylor and the other decisions approving it, referred to in the Port Richmond case.

The decision in the Port Richmond case, sustaining the rate regulation there in question, was expressly confined to rates for outbound ferriage, except in one particular, namely, the rate for round-trip tickets sold in New Jersey.

As to such round-trip tickets it was held that the state of New Jersey could limit the price at which such tickets should be sold in New Jersey (without, however, *requiring* their sale); and the right of the state *to prevent extortion* in transactions within its limits was suggested (at least inferentially) as sustaining such limitation by it of round trip rates.

STATE REGULATION OF ROUND TRIP RATES FOR TRANSPORTATION BY INTERSTATE FERRIES: PREVENTION OF EXTORTION.

Confined to the particular subject matter before the court in that case, viz., transportation by ferries, we can conceive of no objection to the theory so suggested. It does not, we submit, even as applied to round trip rates, constitute an unreasonable or unjustifiable extension of the doctrine in Conway v. Taylor. True, the peculiar right of the state over ferries was there limited to ferriage *from* the shore of the state. But would it not be absurd to say that such ferriage does not include the *whole* of a round trip, commencing on the shore of such state? What reason can be assigned for allowing the state of New Jersey to fix the charge paid by its inhabitants to such a ferry, operating from that state, for transportation to New York, but not what they shall pay for transportation back to New Jersey? Is not the ex-

tent of extra-territorial jurisdiction exercised in the case of the out-bound journey precisely the same as that in the return journey? Nor is there, we submit, any more danger or inconvenience to be apprehended from conflicting state action in the one case than in the other. New York would still be left free and unhindered to fix rates for all ferriage from her shore, including, of course, the *return* portion of all round trips commencing there. Each state would also have exclusive power (subject to the paramount control of congress) to fix the rate for all out-bound transportation, *not* constituting the completing portion of a round trip. It may be added, that in practice, of course, this power of the state over round trip rates could, ordinarily at least, have application only to transportation of persons, not of goods.

These considerations, we submit, amply justify all, and even more than, was actually decided in the Port Richmond case respecting the fixing of round trip ferry rates.

Nevertheless, that we may leave nothing undone which could in anywise assist the court to a right decision of our own case, we propose to anticipate and reply to the claim (if any should be made) that there is, in the Port Richmond case, some intimation that a state may, as a means of preventing "extortion," prescribe

rates to be charged for transportation over which it has no other power of regulation.

To show that such intimation, if made, was not intended, it would be enough, we submit, to refer to the several cases already repeatedly cited expressly deciding that no state has power to regulate rates for any transportation extending beyond its own borders. That necessarily implies, we submit, the denial of any power of the state to prevent extortion in respect to such transportation, by prescribing the charges therefor. But (from motives just indicated) we shall go on and endeavor, however needlessly, to adduce explicit reasons for this conclusion.

Object and Scope of Rate Regulation Not Limited to Preventing Extortion.

We regret that the conditions under which this portion of our brief is being prepared (owing to the advancement of the hearing of this cause to an earlier date than we had stipulated for), prevents us from adequately discussing this point, since we have not time to fully examine and analyze the authorities which may bear thereon.

For the purposes of this argument, however, we will concede that the prevention of extortion is a legitimate object for the police power of the state, even as applied to charges for the local part of an interstate transportation—provided,

of course, that the carrier and the person, or goods, transported, are within the territorial jurisdiction of the state. But we most emphatically submit that the prevention of extortion is not the object, at least not the whole object, and *certainly not all of the usual effect,* of legislative or administrative rate regulations.

For the purpose of argument, we will further concede that a rate which is (to use a common phrase) "unreasonable as to the public," is the equivalent of an extortionate rate.

ONLY LIMITATION UPON RATE REGULATION: MINIMUM REASONABLE RETURN UPON INVESTMENT.

On the other hand, it will surely be conceded to us that (under the law which has been developed upon that subject since the case of Munn v. Illinois, 94 U. S. 113, was decided) the scope of neither legislative nor administrative rate regulation is limited to preventing *extortionate* rates. On the contrary, the only limitation, so far as we are aware, which the courts have placed upon such regulation is that rates shall not be reduced to the point of confiscation to the owner of the public utility. How the question of confiscation—the denial of due process and equal protection—is to be determined, under the Fourteenth Amendment to the federal Constitution, we will not here dis-

cuss. The subject is too familiar a one in this court. But it will not be denied that there is a wide range, in amount, between a rate which is *so low* as to be confiscatory to the owner of the utility, and one which is *so high* as to be extortionate, or unreasonable to the public.

DISCRETION OF RATE-FIXING BODY AS TO AMOUNT OF RETURN: DECISIONS OF CALIFORNIA COURTS AND THIS COURT.

Upon this question, since we are dealing with a rate proposed to be fixed by an agency of the state of California, it is proper, if not necessary, that we should consider what is the law of that state upon this question, as determined by its highest court. The point was carefully considered by that court, in bank, both on original argument and on rehearing, in the case of Contra Costa Water Company v. Oakland. Refusing to hold void for unreasonableness the water rate ordinance there in question, and discussing the duty and power of the court in determining the percentage of profit of which the owner of the utility cannot constitutionally be deprived by a rate regulation, the court said:

> "In fixing upon such percentage, however, the court is not to act upon what it, as an original question, might think to be fair and reasonable, but is, rather, to determine what is *the lowest percentage* which could properly be thought *by the rate-fixing body* to be fair and reasonable. On this

question, *there must be a certain range of discretion* which may be traversed *by the city council* without infringing upon constitutional rights. If the ordinance gives a rate of return which, although low, is not palpably unreasonable, the court is not to upset the action of the council because it may think *a higher rate more appropriate*. The presumption is in favor of the validity of the legislative determination, and the *burden is on the party attacking the rate* fixed to show its invalidity."

Contra Costa Water Co. v. Oakland, 159 Cal. 323, 329.

Without admitting (or here denying) the law laid down in that decision on other points, we believe it will not be questioned that the above quotation states, with sufficient accuracy, the doctrine held by this court, and the several state courts, regarding the discretion which may be lawfully vested in and exercised by rate regulatory bodies.

Indeed, this court itself has repeatedly used language substantially identical with that above quoted, *e. g.:*

"In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our *independent opinion* as to what were *proper rates*. It is enough if we cannot say that it was *impossible* for a

fair-minded *board* to come to the result which was reached."

San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 441;

Knoxville v. Water Co., 212 U. S. 1, 17.

The same proposition of law is necessarily implied in the fundamental principle, elsewhere stated in the decision last cited, namely:

> "The function of *rate-making is purely legislative* in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power."
>
> Knoxville v. Water Co., 212 U. S. 1, 8.

MAXIMUM REASONABLE RATE FOR PUBLIC v. MINIMUM REASONABLE RETURN TO CARRIER.

The distinction upon which we are here insisting between a rate which is unreasonably high for the public and one which is unreasonably low for the utility, was very clearly stated by the decision of this court in Covington etc. Road Co. v. Sanford, where, however, it was laid down as defining the *maximum* of rates which the utility owner has a constitutional right to demand. The opinion is, nevertheless, a

valid authority upon our present contention, since it demonstrates that the two standards of unreasonableness involved in rate inquiries depend upon entirely different considerations, so that the result of applying one may be contrary to the result of applying the other. The exact language of the court on this point should be here quoted:

> "If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the plaintiff's turnpike upon payment of such tolls as, *in view of the nature and value of the service rendered by the company*, are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable."
>
> Covington etc. Road Co. v. Sandford, 164 U. S. 578, 597.

CONSTITUTIONAL RIGHT OF CARRIER TO MAXIMUM REASONABLE RATE IN ABSENCE OF VALID REGULATION.

It needs no argument to show that just as, in some cases, the utility owner may have the misfortune to be compelled to use a property so costly, in proportion to the value to the public of the service rendered thereby, that he cannot lawfully demand rates which will yield the usual

rate of income upon similar investments; so, on the other hand, the utility owner may have the good fortune, or the superior efficiency, to be in position to render a service so valuable to the public, in proportion to the cost of the property by which it is rendered, that he may lawfully demand rates which will yield *more* than the usual income upon similar investments. Nor can it be questioned, we submit, that, in the absence of the fixing of lower rates by valid regulation, under competent authority, the right to enjoy such exceptional profits is as clear and enforcible, and it may be as valuable, as any other right of property.

RATE REGULATION IS ADDITION TO COMMON LAW OBLIGATIONS, WHICH ONLY CONGRESS CAN MAKE.

It must be admitted, therefore, that the fixing of rates by governmental authority creates a new, different, and more burdensome obligation upon the carrier,—i. e. it alters and adds to its common law obligations. For the common law has its own standard of reasonableness, *judicially* ascertained and enforced. But the very purpose of rate regulation is to substitute for this a *legislative* standard, at once different and absolute. This clearly brings the case within the doctrine of the decisions on this head, heretofore fully discussed, which have established

that no such addition to common law obligations, regulating "acts of commerce," can be made by any act of the state, even in the exercise of its police power.

And it is obviously no answer to our present contention to say that there is a common law obligation on the part of those engaged in public service to submit to regulation of their rates by lawful authority. We will grant, for argument's sake, that there is a legislative power, in such a case as that above supposed, to reduce the charges of the utility owner to a point where no more than the average rate of income will be earned upon his investment. But we insist that, beyond all question, such legislative authority, in respect to public utilities whose operations constitute federal commerce, is vested in congress and not in any state.

National Interest in Free Access and Adequate Transportation to All Places.

That the nation at large has a vital interest in having free access, by available and adequate transportation facilities, to such a gem of nature as "the magic isle of Santa Catalina," we shall hereafter emphatically urge; and this consideration has special pertinence to our present point. For little reflection is needed to show that state regulation of the rates for such transportation may easily have a deterring, if

not a disastrous effect upon the maintenance of the adequate facilities thus demanded by the national interest.

Restrictive Effect of Rate Regulation Upon Transportation Facilities.

For, it is possible (although, we admit, not probable) that the rates should be fixed so high as to discourage and hinder those who would otherwise travel to this natural resort, from so doing, so that the very object of the national interest is defeated. This must be so if, as we understand the law to be, the public has no appeal from the determination of a lawful authority as to what is a reasonable rate.

If, in the more probable case, the rates are fixed so low as to prevent the carrier from earning what it might be able to realize in some other, perhaps unregulated, employment, the ultimate result must be the reduction, if not the withdrawal of its transportation service. There may be, theoretically, a power in the regulating authority to compel continuance in the public service of the *property* once devoted to it; but it has never been held, we believe, that such power extends to the *person*—i. e. that anyone could be actually and physically compelled to continue devoting his time and personal energy to any business or employment, against his will. In any case, as a *practical* matter, we know

that, in the long run, neither labor nor capital can be kept in a business which is less remunerative than other available employments.

If it should be said, in answer to our present contention, that we exaggerate the possibility of adverse effect from state regulation of rates, we may reply, in the language of this court (referring to the levying of a tax, which this court has said is not distinguishable in effect from the regulation of rates):

> "If such a tax can be levied at all, its amount will rest in the discretion of the state. It is idle to say that the interests of the state would prevent oppressive taxation. Those engaged in foreign and interstate commerce are not bound to trust to its moderation in that respect; they require security. And they may rely on the power of congress to prevent any interference by the state until the act of commerce, the transportation of passengers and freight, is completed."
>
> Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (205).

This, of course, is only expressing what is implied in all the cases which have held void state action affecting commerce. For in all such cases this court has considered, not merely the *actual* effect of the exertion by the state of the power claimed, as exhibited in the facts of the case before it, but *all possible consequences* of

conceding to the state the right to exert such power.

The decisions of this court we have repeatedly cited, holding void state regulation of transportation rates, are themselves a sufficient answer to the contention just suggested. Indeed we fear that we are trespassing upon the time of the court in trying to add anything to the argument of those decisions.

BURDEN OF PROOF UNDER RATE REGULATIONS: DIFFICULTIES OF ENFORCING CONSTITUTIONAL RIGHT: AN INDEPENDENT GROUND FOR EXCLUDING STATE ACTION FIXING RATES.

If it be further answered that we are ignoring the constitutional limitation upon the downward range of rate fixing, we rejoin that this also is a theoretical rather than a practical limitation, so far as actually insuring to the investor in a public utility the average return upon other investments in the same locality (to say nothing of the objections to this argument, implied in all that we have said above).

Conceding that this minimum limitation has been set by the decisions of this court (e. g. Willcox v. Consolidated Gas Co., 212 U. S. 19 48-9), yet repeated decisions of this court in this class of litigation attest the almost insurmountable difficulty which attends the proof of

actual violation of this theoretical limitation by a rate fixing body. Again and again has this court reversed judgments to this effect, rendered by trial courts, holding that every doubt must be resolved against the complaining utility owner. If we are not mistaken, no judgment annulling a rate has been affirmed by this court (or a judgment to the opposite effect reversed) where the case presented did not show a reduction of rates *very materially below* the minimum above supposed to have been established. Indeed such was the course of decision for many years—accidentally no doubt—that it was generally believed that the decisions of this court did not require the annulment of a rate unless its result was to deprive the utility owner of *any* return.

This whole question of the difficulty of judicially establishing the unreasonableness of a utility rate fixed by lawful authority was discussed at length by this court in

Ex parte Young, 209 U. S. 123.

That decision (especially with the commentary thereon afforded by the many other decisions of this court in rate regulation cases above referred to) clearly demonstrates, we submit, that the change in the condition of the common carrier which necessarily results from a reduction of rates by public authority—even

if it did no more than throw upon the carrier *the burden of proof* which was previously upon the public, of showing the unreasonableness of the rate, fixed or charged, as the case may be—casts upon such carrier a most onerous and oppressive burden.

This latter aspect of the situation created by rate regulation is alone enough to bring the case within the doctrine heretofore invoked, since such rate regulation, in any case, will have "manifestly imposed a burden so direct and onerous as to leave no room for question that it was a regulation of interstate commerce."

See,

McNeill v. Southern R. Co., 202 U. S. 543, 561.

AUTHORITIES APPLICABLE TO BOTH ABOVE GROUNDS FOR EXCLUDING STATE REGULATION OF RATES.

The principle thus applicable here was vertually involved in all of the other decisions above cited, wherein, expressly or by implication, it was held that the exercise of the police power of a state "cannot extend so far as to thereby regulate interstate commerce," (Central etc. R. Co. v. Murphey, *supra*, 196 U. S. 194, 207).

Its application is especially evident in those cases where this court, after holding the state

police regulation in question to be void, because a regulation of commerce, has declared it to be unnecessary to consider whether such regulation is also a deprivation of due process, etc. See, for example,

McNeill v. Southern R. Co., *supra,* 202 U. S. 543, 563.

While it may be, as we have virtually conceded for the purposes of this argument, that the state may adopt reasonable and proper means to enforce the common law duty of rendering transportation service *within the limits of the state,* at rates which are not extortionate, or unreasonable as to the public, it can neither add to those obligations nor adopt any unreasonable or onerous means of enforcing them. The cases supporting this view of the law have all been sufficiently discussed and quoted. The following are pertinent decisions:

Crutcher v. Kentucky, 141 U. S. 47; 35 L. Ed. 649;

Western U. T. Co. v. James, 162 U. S. 650 (especially at p. 662);

Central of Georgia R. Co. v. Murphey, 196 U. S. 194;

Houston & Tex. C. R. Co. v. Mayes, 201 U. S. 321;

McNeill v. Southern R. Co., 202 U. S. 543;
Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328;
Missouri P. R. Co. v. Larabee etc. Co., 211 U. S. 612;
St. Louis S. W. & R. Co. v. Arkansas, 217 U. S. 136;
Kansas C. S. R. Co. v. Drainage District, 232 U S. 494.

SPECIFIC AND CONCLUSIVE DECISIONS ON INVALIDITY OF STATE RATE REGULATION.

Furthermore, the decisions to the specific point of the invalidity of state regulation of rates for transportation constituting a part of interstate or foreign commerce are, we submit, a complete and final answer to the suggestion that such regulation can be made for the purpose of preventing extortion, or for any other purpose. We need not here repeat the citation of those decisions, but we invite special attention to the latest of them, Railroad Commission v. Worthington. For in that case the rate which was held void had been prescribed by the Railroad Commission of the state of Ohio for a transportation performed wholly within the state.

Railroad Comm. v. Worthington, 225 U. S. 101.

COMMON LAW SUFFICIENTLY DEFINES OBLIGATION AS TO REASONABLE RATES.

It appears to have been further urged by counsel in the Port Richmond case,—and possibly to have had some influence upon the decision rendered,—that, if held not subject to regulation by the state, "the ferry rates are to be deemed free from all control." But is this not the very contention made and disposed of in the case we have already cited, viz., Western Union Teleg. Co. v. Call Publishing Co., (181 U. S. 92)? Surely there is not to be any recession from the doctrine of that case, which had, indeed, been explicitly declared in previous decisions, of which we need here cite only one example,—

Covington etc. Bridge Co. v. Kentucky, 154 U. S. 204, 222.

See also:

Kansas v. Colorado, 206 U. S. 46, 96.

STATE MAY ENFORCE COMMON LAW OBLIGATION WITHOUT PRESCRIBING NEW STANDARD OF REASONABLENESS.

It may not be amiss to add that if there is any necessity, or right in the state, to provide additional means or sanctions for the enforcement of the duty of rendering service at reasonable rates, beyond those provided by the

common law, it can be effectively done without regulation of rates. It might, for example, make it an offense, punishable by fine or imprisonment, to demand or receive extortionate rates; and a commission, it may be, could be appointed to investigate the charges of interstate carriers (for transportation beginning or ending within the state) with the power and duty of instituting criminal proceedings to enforce such penalties, or common law civil proceedings in injunction, or mandamus, or for forfeiture of charter or franchise, and the like, to secure the same end, of enforcing common law obligations,—but, it cannot be too often repeated, *not* to add to those obligations. And we must reiterate, most emphatically, that we do not concede that the state may exert its police power to prevent extortion, or for any similar purpose, in regard to transportation, the whole route of which does not lie within the state.

Explanation of Decision in International Transit Case (234 U. S. 333).

In the foregoing discussion of the decision and opinion in the Port Richmond Ferry case, we have said nothing of the decision, rendered at the same time, in the case of

Sault St. Marie v. International Transit Co., 234 U. S. 333.

That case held void an ordinance of the city of Sault St. Marie, Michigan, requiring the taking out of a license for the carrying on of a ferry between said city and the opposite shore of the St. Mary's River, in Ontario, Canada. All that we think it necessary for us to say concerning that decision is, briefly, as follows:

(I) That Decision Consistent with Our Contentions Here.

First: The *decision* in that case is not inconsistent with any contention of ours in the case at bar, or with any provious decision of this court upon which *we* rely.

(II) That Decision Construed as Confined to Ferry from Canadian Shore.

Second: The ground of decision taken in that case, that it was not competent for the state of Michigan (through one of its municipalities or otherwise) to forbid the carrying on of the ferry there in question, without its consent, it is obvious, cannot be reconciled with the decision in Conway v. Taylor, *supra*, that the ferry *there* in question could not lawfully be carried on without the consent of the state of Kentucky, unless the two decisions related to different kinds of ferries. It may be that such a difference can be found in the circumstance that in the International Transit case the ferry appears to have had its home port in, and to have re-

ceived its franchise from, the Dominion of Canada,—not the state of Michigan. Such a ferry, operating *from* the *opposite* shore, it was held, in Conway v. Taylor, *supra,* could lawfully be operated without the consent of the state; and such lawful operation, as we have argued, must include the *return* journey completing a round trip *commencing* on the Canadian side. If, then, the ordinance involved in the International Transit case could be construed as requiring the taking out of a local license for such a ferry, undoubtedly its invalidity, to that extent, necessarily followed from the previous decisions of this court. And there would seem to be sufficient authority for holding that the fact that the same party also operated what was, in law, *another* ferry, from the Michigan shore, for which (under the doctrine of Conway v. Taylor, *supra*) a license could be required, would not save the ordinance from condemnation, if the void and valid requirements thereof were inseparable.

Crutcher v. Kentucky, 141 U. S. 47, 59; 35 L. Ed. 649;

Osborne v. Florida, 164 U. S. 650, 655;

Barrett v. New York, 232 U. S. 14, at pages 30, 31.

(III) PREVIOUS DECISIONS REPEATEDLY HELD STATE REGULATION OF RATES ON PAR WITH LEVYING OF TAX.

Third: We must, of course, respectfully take exception to the distinction suggested in the opinion in the International Transit case, between the requirement of a license for carrying on transportation, there involved, and the regulation of rates for transportation, involved in the Port Richmond Ferry case. No previous decisions of this court are cited as authority for such distinction, and we are constrained to submit, most respectfully, that no such authority can be found in those decisions. On the contrary, as we have already shown, it has been expressly denied by those decisions that there is any distinction in its unconstitutional effect upon interstate commerce, between a tax and a rate regulation.

With the utmost respect and deference, therefore, but with all earnestness, we submit that for all these reasons the opinion rendered in the Port Richmond ferry case cannot be regarded as having any bearing upon the case at bar; and, furthermore, that it should be made clear by the decision of the court herein that the doctrine and reasoning of that case are not to be applied to transportation of any other class than that of strictly local ferries.

D—SUPPLEMENT AND SUMMARY: GROUNDS AND HISTORY OF DOCTRINE OF EXCLUSIVE FEDERAL POWER OVER COMMERCE: APPLICATION OF ESTABLISHED PRINCIPLES TO FACTS OF CASE AT BAR.

1—*Preliminary.*

REASONS FOR EXCLUSIVENESS OF FEDERAL POWER IMMATERIAL, BUT NEVERTHELESS WILL BE EXAMINED.

We have thus far assumed that, as positively declared by this court, "it is not necessary to review the cases in this court which have settled beyond peradventure that the national government has exclusive authority to regulate interstate commerce under the constitution of the United States" (Railroad Commission v. Worthington, 225 U. S. 101, 107); that is to say, it is not necessary *now* to inquire *why* the national authority is exclusive, in any particular case.

Consequently, we have likewise assumed that it is necessary here to show only that the transportation business of the plaintiff in error is "commerce with foreign nations," and that the attempted action of the state is a "regulation" thereof—within the meaning of the constitution and of the above stated doctrine of this

court—all of which, we believe we have shown. Without receding from that position we now undertake a work of supererogation. We propose to do what this court has said it was not necessary to do, viz., to examine the grounds of this rule; and to show that, under any possible view of those grounds, our case is within the rule.

2—*The Federal Power to Regulate Commerce Delegated by Constitution Is, from Its Very Nature, Necessarily and Wholly Exclusive.*

VIEWS OF MARSHALL, C. J., AND STORY, J.: POWER TO REGULATE COMMERCE, BEING VESTED IN CONGRESS, CANNOT REMAIN IN THE STATES.

We desire to adopt as our own, the argument on this point by Mr. Justice Story in New York v. Miln. He there said:

> "It has been argued that the power of congress to regulate commerce is not exclusive, but concurrent with that of the states.
>
> * * * * * * * * * *
>
> "The power given to congress to regulate commerce with foreign nations, and among the states, has been deemed exclusive: from the nature and objects of the power, and the necessary implications growing out of its exercise. *Full power to regulate a particular subject implies the whole power, and leaves no residuum:* and a grant of the whole to one, is incompatible

with a grant to another of a part. *When a state proceeds to regulate commerce with foreign nations, or among the states, it is doing the very thing which congress is authorized to do;* Gibbons v. Ogden, 9 Wheat. 198, 199. And it has been remarked, with great cogency and accuracy, that the regulation of a subject indicates and designates the entire result; applying to those parts which remain as they were, as well as to those which are altered. It produces *a uniform whole,* which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that upon which it has operated; Gibbons v. Ogden, 9 Wheat. 209."

New York v. Miln, 11 Pet. 102, 158;—9 L. Ed. 648.

That this statement of Mr. Justice Story justly represents the opinion of Mr. Chief Justice Marshall in Gibbons v. Ogden, will be admitted, we believe, by every unprejudiced reader of that opinion. This, in effect, was expressly recognized by the opinion, delivered for a unanimous court, in

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 211; 29 L. Ed. 158.

We should also refer, on this point, to the concurring opinion of Mr. Justice Johnson, in Gibbons v. Ogden, (especially 9 Wheat. at page 227) where he states and ably justifies the absolute rule of exclusiveness.

We admit that it is true, that the *decision* in Gibbons v. Ogden, in terms, was rested upon the ground that congress, by granting a license to the steamboat there in question, to engage in the coasting trade, precluded the state of New York from denying, or interferring with, the rights granted by such license; and true, also, that the above quoted views of Mr. Justice Story did not receive the concurrence of a majority of the court in New York v. Miln. But as to this last it is further true that in this same opinion, in which he urged the conclusion, in effect, that the statute of New York there in question was repugnant to the commerce clause,—regardless of any regulation of the subject-matter by congress,—Mr. Justice Story, in concluding his opinion, said:

> "In this opinion I have the consolation to know that I had the entire concurrence, upon the same grounds, of that great constitutional jurist, the late Mr. Chief Justice Marshall. Having heard the former arguments, his deliberate opinion was that the act of New York was unconstitutional, and that the present case fell directly within the principles established in the case of Gibbons v. Ogden, 9 Wheat. 1, and Brown v. The State of Maryland, 12 Wheat. 419."
>
> New York v. Miln, 11 Pet. 102, 161; 9 L. Ed. 648.

ESSENTIAL AGREEMENT WITH DOCTRINE OF RECENT DECISIONS.

Our present contention, therefore,—that the constitutional grant of federal power to regulate commerce is, necessarily and inherently, an exclusive power—has the sanction of approval by Marshall and by Story. That of itself is persuasive. But, if we mistake not, it now has, also, the unqualified approval of this court, since, we submit, it is identical with the view so positively stated in the quoted passage from the unanimous decision of this court in Railroad Commission v. Worthington, *supra*,—to say nothing of a host of other recent decisions,—among which we may especially invoke the explicit ascription of the rule of exclusiveness to the necessity of regulation by *one* authority, as already quoted from

Hanley v. Kansas etc. R. Co., 181 U. S. 617, 620,

and from

Simpson v. Shepard, 230 U. S. 352, 400.

EARLY STRENUOUS OPPOSITION TO ADMISSION OF EXCLUSIVE FEDERAL POWER.

We admit, however, that, notwithstanding the conclusive reasoning of the great constitutionalists, above set forth, the exclusiveness of the federal power was denied in repeated opinions delivered by individual members of the

court between the time of the decision in Gibbons v. Ogden, *supra*, and that in Cooley v. Port Wardens.

It is also true that it was not until 1867, (some two years after the close of the Civil War), that, for the first time in the history of this court, a state statute was declared to be void on the ground that it was repugnant to the commerce clause of the federal constitution, although congress had not acted upon the same subject-matter.

> Steamship Co. v. Port Wardens, 6 Wall. 31, 34; 18 L. Ed. 749.

In that case, however, there was an independent ground of decision, and its authority on the rule of exclusiveness was greatly weakened by the case decided at the same term and reported upon the next page of the official volume, viz:

> Crandall v. Nevada, 6 Wall. 35; 18 L. Ed. 745.

So that, it was not until 1872 that the rule of exclusive federal power under the commerce clause was clearly affirmed, with the unanimous approval of the court. (Two justices, indeed, in that case dissented from the *decision*, but not, apparently, from its doctrine of exclusiveness.)

> State Freight Tax Case, 15 Wall 232; 21 L. Ed. 146.

Is it not the fair inference, then, that this strenuous opposition to the admission of an exclusive power in congress to regulate commerce, was part and parcel of the great controversy contemporaneously waged over the question of "state's rights" and that the subsequent custom of this court to assign specific reasons for each assertion of the rule of exclusiveness, is an inheritance from the antecedent years of determined opposition and bitter controversy?

ADVANTAGES OF AN EXPLICIT ADOPTION OF VIEWS OF MARSHALL, C. J., AND STORY, J.

We venture to urge, therefore, that it might relieve the court from much needless labor, and the bar and the country from the doubt and confusion some still experience, if the rule of exclusive federal power, under the commerce clause, were to be now explicitly and finally rested upon the all-sufficient, and all-embracing, grounds taken by Mr. Chief Justice Marshall and Mr. Justice Story in Gibbons v. Ogden, *supra,* and New York v. Miln, *supra.*

3—*Upon Whatever Approved Grounds the Rule of Exclusive Federal Power Over Commerce Is Predicated, That Rule Clearly Decides the Case at Bar Against the Defendant in Error, the Railroad Commission of California.*

DOCTRINE THAT "COMMERCE SHALL BE FREE AND UNTRAMMELED."

The reasons which this court has given (in different classes of cases, and in varying language) for holding state action to be an encroachment upon the exclusive commercial power of congress, have often been analyzed and summarized in opinions delivered for the court,—all of much the same import. The example which happens to lie nearest at hand (in the case of Leisy v. Hardin), is as representative and authoritative as any other, and we therefore quote from the opinion of Mr. Chief Justice Fuller in that case. There, after referring to the rules laid down in the Federalist concerning the exercise of "concurrent and independent power" by the states, and delivering the opinion of this court, the learned jurist said:

> "Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and congress remains silent, this is not only not a concession that the powers reserved by the states may be exerted as if the specific power had not been elsewhere re-

posed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the states cannot be permitted to effect that which would be incompatible with such intention. Hence, *inasmuch as interstate commerce*, consisting in the transportation, purchase, sale and exchange of commodities, *is national in its character*, and must be governed by *a uniform system*, so long as congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammeled. Mobile County v. Kimball, 102 U. S. 691; Brown v. Houston, 114 U. S. 622, 631; Wabash St. L. & P. R. Co. v. Illinois, 118 U. S. 557; Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 493."

Leisy v. Hardin, 135 U. S. 100, 109-10, 34 L. Ed. 128.

"Freedom of Commerce" Exemplified by Cases Heretofore Cited.

Every case which we have cited in the foregoing divisions of this brief, holding void state action under the commerce clause, illustrates the meaning of this rule, that "such commerce shall be free and untrammeled." And we are certain it will be admitted that, if the Island of Santa Catalina were a part of the territory of any other state or of a foreign country, the commerce effected in transportation by plaintiff in error between that island and the mainland

would not be "free and untrammeled," within this settled doctrine of the decisions, if the Railroad Commission of the state of California were permitted to regulate the rates charged for that transportation.

We do not admit, or believe, that it is incumbent upon us to show any specific reasons why the same conclusion must be drawn in this case, the Island of Santa Catalina being a part of the territory of the state of California. For a contrary conclusion, we submit, cannot be reached in this case without denying the authority of the decisions of this court above cited, holding that transportation over a route outside the jurisdiction of a state, although between termini both within the state, is commerce subject to the regulation by congress under the federal Constitution. Nevertheless, it is not difficult, we feel sure, to demonstrate that essentially the same considerations, or motives, which would support the conclusion above indicated, if the case were one of transportation between one state and another state or foreign country, are equally operative and effective, in the situation actually existing.

RIGHT OF FREE MIGRATION AND TRANSIT INTO EVERY PART OF EVERY STATE.

We appeal, in the first place, to the general considerations invoked in Crandall v. Nevada, *supra,* where, after asserting the right and power of the nation to call all its citizens to any part of the country where their service, or their presence, may be desired, this court further said:

> "But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share in offices, to engage in administering its functions. He has a right to *free access to its seaports,* through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several states, and this right is in its nature *independent of the will of any state* over whose soil he must pass in the exercise of it."
>
> Crandall v. Nevada, 6 Wall. 35, 44; 18 L. Ed. 745.

It is true, as we have already remarked, that the decision just quoted was not, in terms, rested upon the commerce clause. But as to that it is to be further said, in the first place, that the considerations invoked are equally

valid, whatever provision of the federal Constitution may be in question; and, in the second place, that if the case had arisen after the decision of this court in the State Freight Tax Case, *supra* (and many others of like impression, which might be mentioned), the conclusion which was reached in Crandall v. Nevada would undoubtedly have been rested upon the commerce clause; and, in the third place, that substantially the same considerations *have* been invoked in decisions rendered by this court under that clause, holding void state action impeding or hindering the free movement of persons or goods, in commerce among the states or with foreign countries; and, in the fourth place, that the decision in Crandall v. Nevada has, in many subsequent cases, been treated as an interpretation of the commerce clause; notably, among others, in the State Freight Tax Case just cited (15 Wall. 232, 281, 21 L. Ed. 163). See also:

Cook v. Penn., 97 U. S. 566, 571, 24 L. Ed. 1017;

Moran v. New Orleans, 112 U. S. 69, 73, 28 L. Ed. 655;

Robbins v. Shelby Co., 120 U. S. 489, 492, 30 L. Ed. 696;

Phil. S. S. Co. v. Pennsylvania, 122 U. S. 339, 30 L. Ed. 1202;

Covington etc. Co. v. Kentucky, 154 U. S. 204, 213, 38 L. Ed. 967.

THIS RIGHT EMPHATICALLY OPERATIVE IN CASE AT BAR.

We can conceive no ground upon which it may be argued that these considerations are not relevant, or not decisive, in the case at bar. Certainly, if any case ever called emphatically for their application, it is this. For without disparagement to any other part of our broad land, all will admit that the state of California has been blessed by nature with many marvelous wonders and beauties which it is the privilege (and, we of California think, the duty) of every citizen and inhabitant of our country to visit and enjoy.

This court of course will take judicial notice of the physical existence and location of all these natural beauties, and of the yet undeveloped natural sources of wealth on the public domain and elsewhere in the state; and also of the immense number of tourists who, every year, journey from all the states of this Union to visit these natural wonders, and, it may be, to help develop these natural resources, of the state of California.

The privilege and right, on which we here insist, of every inhabitant of every state of the Union, not to speak of foreign countries, to enjoy and profit by these gifts of nature, must, under the settled doctrines of this court interpreting and enforcing the commerce clause, in-

clude the right to be transported to any and all portions of the state of California necessary to be traversed in reaching any of these points of interest, without let or hindrance by the authority of the state.

For it has been stated, over and over again, by the decisions of this court, commencing with Gibbons v. Ogden, that

> "The power of congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several states, or with the Indian tribes.' It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies."
>
> Gibbons v. Ogden, 9 Wheat. 1, 9, 6, L. Ed. 23.

THIS RIGHT HERE INVOKED TO SHOW, NOT EXISTENCE OF FEDERAL POWER, BUT EXCLUSION OF INTERFERING STATE ACTION.

If it were said that our argument proves too much, and that it would invalidate all regulations by the state of California of transportation rates, although limited to wholly intrastate journeys, the answer would be that the purpose and bearing of our present contention were then misunderstood. Our contention is not,

now, that the transportation carried on by plaintiff in error is a part of the commerce committed to regulation by congress, under the federal Constitution,—for *that* we have already established,—but only that the attempted regulation of rates by the state Railroad Commission encroaches upon the field of congressional action thus existing, and impedes the constitutional "liberty" of commerce, within the principles decided in the numerous cases we have cited, in former divisions of this brief.

Not Ordinary Case of Movement Wholly Within the State.

Moreover, it must be considered, that our case presents a distinguishing feature in this, that to reach the part of California particularly in question here, it is necessary to go outside the jurisdiction of the state, upon the high seas. This, obviously, is not the case of ordinary transportation between different points in the same state.

Stating our proposition more specifically, we are *here* endeavoring to show only that the reasons which this court has given in its previous decisions for holding the right of transportation from state to state to be exempt from any hindrance or regulation, by any state, obtain with similar, if not the very same effect, in the case at bar. That is to say, our imme-

diate question is simply this: Would the threatened action of the state of California interfere, to any degree, with the right to transport, or be transported, in "commerce among the states" or "with foreign nations," in the constitutional sense? We submit that consistently with previous decisions of this court, the answer to that question must be, Yea.

Absence of Discrimination Against Non-Residents Immaterial.

Neither would it be any answer to our present contention to suggest that the proposed regulation of transportation rates by the defendant in error would not discriminate against persons coming from other states or foreign countries, but would be an equal hindrance to the movement, within the state, of its own people. For that very objection, in substance, has been already raised, and answered by this court, in several cases. See

State Freight Tax Case, 15 Wall. 232, 21 L. Ed. 163;

Robbins v. Shelby Tax. Dist., 120 U. S. 497, 30 L. Ed. 697;

Bowman v. Chicago etc. R. R., 125 U. S. 496, 31 L. Ed. 711;

Minnesota v. Barber, 136 U. S. 326, 34 L. Ed. 460;

Scott v. Donald, 165 U. S. 98, 41 L. Ed. 644.

The language of the State Freight Tax Case on this point is very apposite:

> "The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state. *Nor is a rule prescribed for carriage* of goods through, out of, or into a state any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. Doubtless a state may regulate its internal commerce as it pleases. If a state chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another state, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the state."
>
> State Freight Tax Case, 15 Wall. 232. 277, 21 L. Ed. 163.

Furthermore, under the express decisions of this court, the people of California themselves are entitled to this same protection at the hands of the federal government against such an interference with *their* rights in and to interstate and foreign commerce. Thus, in Minnesota v. Barber, *supra*, speaking by Mr. Justice Harlan, it was said:

> "A burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such

statute. [Citations.] The people of Minnesota have as much right to protection against the enactments of that state, interfering with the freedom of commerce among the states, as have the people of other states."

Minnesota v. Barber, 136 U. S. 313, 326, 34 L. Ed. [illegible].

This last consideration would be an answer, also, to the claim, if any were made, that the rights and interests of non-residents of California, in respect to transportation and travel within that state, could be sufficiently protected by a regulation of the charges for transportation of such persons only, under authority of congress.

INTOLERABLE CONFUSION IF NON-RESIDENTS' RATES REGULATED BY CONGRESS, AND RESIDENTS' RATES BY STATE.

Moreover, such regulation of charges for transportation of non-residents, under congressional authority, while at the same time the charges for transportation of residents of California were regulated under state authority, would undeniably present an example of confusion of authority, to escape which, this court has repeatedly declared, was one of the moving

causes in the adoption of the commerce clause. For illustrations, see, among many other cases:

Hall v. De Cuir, 95 U. S. 485, 489, 24 L. Ed. 547;

Wabash etc. R. Co. v. Illinois, 118 U. S. 557, 572, 30 L. Ed. 447;

Hanley v. Kansas etc. R. Co., 187 U. S. 617, 620.

This brings us to consider an additional, independent reason why the authority of congress to regulate all these transportation rates (an authority which, we repeat, has been shown to exist) should be held exclusive.

LIKE CONFUSION IF CONGRESS REGULATES COST OF TRANSPORTATION AND STATE REGULATES CHARGES THEREFOR.

For the power of congress to regulate, in other respects, the transportation carried on by plaintiff in error, not only exists, but has, by express enactments, been exercised. The size, character, equipment and manning of plaintiff's boats, and other features of its transportation business, have been regulated by acts of congress, and to these regulations plaintiff in error, of course, must and does conform.

Every one, surely, will admit that it must be hurtful, if not disastrous, to such a transportation business as that of plaintiff in error, to have one authority prescribing the manner in

which and the character of instruments with which that transportation shall be conducted,—thereby determining the cost of the service rendered,—and at the same time to have the rates to be charged for such transportation prescribed by a wholly independent authority. It may be, we do not deny, that in the case of wholly intrastate water transportation, such undesirable condition obtains; but, we submit, that is no reason why it should be extended to another branch of water transportation,—but quite the contrary. In this aspect of the case, also, it is brought within the doctrine of the decisions just cited, and others of like impression.

Having thus, as we feel, imposed upon the court more than sufficient argument upon this point, even if necessary to be considered by it in the disposition of the case, we desist from further discussion; although we cannot but suggest that there may be other, and equally cogent reasons, why the rule of exclusive federal power over interstate and foreign commerce should be applied as we contend for in this case.

In Conclusion.

No extended *resume* of an argument already too long can be needed—the less so, that the index which prefaces this brief sufficiently indicates all the points of our argument. Though our brief is so long, it might easily have been much longer: for the citations of authorities to our several propositions are not exhaustive,—although we believe them to be truly representative.

It is enough, then, that we submit the whole case to the court for the painstaking consideration which we know it will receive—so far as that may be necessary to a right decision of any of the questions involved; and we will add by way of brief summary, only this:

That we submit—

1. It must be held that the transportation here in question *is commerce,* and commerce which the Constitution gives congress the power to regulate—unless this court shall repudiate the doctrine of its explicit decisions in Lord v. Steamship Company, Hanley v. Kansas etc. R. Co., and Abby Dodge v. United States.

And, therefore, that:

2. It must be held that this regulating power of congress has been so exercised as to exclude the regulation of such transportation by the

state of California here attempted,—unless this court shall repudiate the doctrine of Gibbons v. Ogden and the numerous cases which have approved and applied the principle of decision there announced, namely, that the grant by congress of a right to carry on the coasting trade precludes all interference with that right by any state.

3. It must also be held that the action of the state here attempted, through its railroad commission, is a regulation of that transportation within the meaning of the Constitution, vesting congress with *exclusive* power in that behalf,—unless this court shall repudiate the doctrine of the cases commencing with Wabash etc. R. Co. v. Illinois, and ending with Railroad Commission v. Worthington, dealing specifically with attempted rate regulation under state authority—as well as the overwhelming number of other cases dealing with analogous forms of state action.

Respectfully submitted,

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Attorney for Plaintiff in Error.

EDWARD E. BACON,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914

WILMINGTON TRANSPORTATION COMPANY,
Plaintiff in Error,
vs.
RAILROAD COMMISSION OF CALIFORNIA,
Defendant in Error.
} No. 369.

BRIEF OF DEFENDANT IN ERROR

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

I.

The Issue.

The issue in this proceeding is whether the State of California has the right to establish the rates to be charged for the transportation of persons and property by vessel between two points, both of which are located in Los Angeles County, California.

The transportation is conducted by vessels which, in navigating directly between these two ports, traverse 21 miles of high seas. These vessels do not touch at any port of any other state or of any foreign nation. They do not traverse the territory of any other state or of any foreign nation. They do not transfer passengers or freight to any other vessel nor receive the same from any other vessel. They do not

form a continuous route with any railroad or any other vessel, but are engaged in separate, distinct and isolated transportation between two ports in the same county in the same state.

They use the high seas solely for the purpose of navigating, by the most direct line, from one portion of Los Angeles County, California, to another portion of the same county.

Plaintiff in error, hereinafter referred to as the Transportation Company, contends that this commerce is commerce *"with foreign nations"*, and necessarily bases its entire case on that claim.

Defendant in error, hereinafter called the Railroad Commission, contends that this commerce is purely local California commerce; that it is not commerce "with foreign nations"; and that even if it should be held to be commerce "with foreign nations" the State of California has the right to regulate the rates charged, for the reason that the Federal Government has not acted in this field.

II.

Proceedings Before Railroad Commission.

1. *Complaint.*

On March 25, 1913, J. H. Miller and E. Donaldson, partners doing business under the firm name and style of Miller and Donaldson, filed with the Railroad Commission of California their complaint against Wilmington Transportation Company. The complaint (Record, pp. 4-6) alleges, in effect, that the complainants are engaged in the sale of grocer-

ies, meats, hardware and provisions at Avalon, Santa Catalina Island, County of Los Angeles, State of California; that the defendant is a California corporation engaged in the business of a common carrier of persons and property between San Pedro and Avalon, both of said places being located within the County of Los Angeles, State of California; that the distance from San Pedro to Avalon is about 27 miles; that the defendant is the only common carrier of persons or property whose vessels ply between the said two ports; that the rates charged by defendant for the transportation of persons and property are as specifically set out in the complaint, and that they are unjust and unreasonable and contrary to the provisions of Section 13(a) of the Public Utilities Act of California; that the complainants have for the last four years shipped freight in the defendant's vessels, and have paid freightage thereon amounting to about $2500 per year, and that they have been damaged by reason of excessive freightage in the sum of $1000 per year, and that if defendant is permitted to continue to charge its said rates, complainants will suffer irreparable injury. The complainants ask that the Railroad Commission adjust the rates charged by the defendant for the transportation of persons and property and that it reduce said rates to a just and reasonable basis.

2. *Motion to Dismiss.*

On April 21, 1913, the defendant filed its motion to dismiss the complaint, on the ground that the Railroad Commission does not have jurisdiction to

entertain the same, and particularly on the ground that it appears from the complaint that the defendant is engaged in "interstate commerce" between ports on the Pacific Ocean, across one of the great arms thereof, viz., the Gulf of Catalina, and, also, that it does not appear from the complaint that the defendant is engaged in intrastate traffic within the State of California. (Record, p. 16.) At the hearing, the defendant abandoned the claim that this is "interstate commerce" and took the position that it is commerce "with foreign nations".

3. *Argument.*

Thereafter, on June 4, 1913, argument on the motion to dismiss was had before the Commission. At the argument it was stipulated between the parties that the vessels employed by the defendant in its transportation between San Pedro and Avalon are enrolled and licensed to carry on the coasting trade under the acts of the Federal Congress.

4. *Decision.*

On July 9, 1913, the Commission rendered its decision denying the motion to dismiss and directing the defendant to satisfy the complaint or to answer within ten days. (Record, pp. 17-34.) The Commission thereafter denied the application for rehearing.

III.

Proceedings Before Supreme Court of California.

1. *Writ of Review.*

The Transportation Company thereafter filed with the Supreme Court of California its petition for a

writ of review, as provided by Section 67 of the Public Utilities Act of California. (Record, pp.1-3.) The Supreme Court made its order for the issuance of the writ of review (Record, pp. 9-10) and the Railroad Commission made its return thereto. (Record, pp. 12-37.)

2. *Decision of Supreme Court of California.*

The Supreme Court thereafter rendered its decision holding that the commerce in question is not commerce "with foreign nations", that it is local California commerce and that the State of California, through its Railroad Commission, has jurisdiction to establish the rates to be charged for the transportation of passengers and freight by the Transportation Company's vessels. (Record, pp. 37-43.) 166 Cal. 741.

From this decision the present writ of review is prosecuted.

ARGUMENT.

We shall now present our argument and the authorities in support thereof, under three main points, with their ramifications, as follows:

(1) The Constitution and statutes of California specifically confer upon the Railroad Commission jurisdiction to establish the rates in question.

(2) Commerce between San Pedro and Avalon is local California commerce and not commerce with foreign nations.

(3) Even if this is commerce with foreign nations, California may regulate the rates charged, because the Federal Government has failed to act.

I.

CALIFORNIA CONSTITUTION AND STATUTES SPECIFICALLY CONFER JURISDICTION UPON RAILROAD COMMISSION.

We shall now consider the provisions of the Constitution and Statutes of California bearing on the question at issue, and shall show that under these provisions, the Railroad Commission has jurisdiction, in so far as the State of California can confer jurisdiction, to establish the rates for the transportation in question.

A.

Constitutional Provisions.

Section 17 of Article XII of the Constitution of California reads in part as follows:

> "All railroad, canal and *other transportation companies* are declared to be common carriers and subject to legislative control."

Section 22 of Article XII of the Constitution of this state, as amended on October 10, 1911, reads in part as follows:

> "There is hereby created a Railroad Commission which shall consist of five members and which shall be known as the Railroad Commission of the State of California. * * * *Said Commission shall have the power to establish rates of charges for transportation of passengers and freight by railroads and other transportation companies.* And no railroad or other transportation company shall charge or demand or col-

lect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff or rates, established by said Commission, than the rates, fares and charges which are specified in such tariff. The Commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpoenaes and all necessary process and send for persons and papers; and the Commission and each of the Commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record; the Commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.

"No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Section 23 of Article XII of the Constitution of this state, as amended on October 10, 1911, after referring to other classes of public utilities, provides in part as follows:

"Every *common carrier* is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature."

The section further provides as follows:

> "The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and *to fix the rates to be charged for commodities furnished, or services rendered by public utilities* as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

B.

Statutory Provisions.

Acting under the authority conferred by the foregoing constitutional provisions, the Legislature of this state, at its extraordinary session in 1911, enacted the Public Utilities Act, which became effective on March 23, 1912. This act provides in part as follows:

> Sec. 2. (1). "The term 'common carrier,' when used in this act, includes every railroad corporation * * * and every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing *any vessel regularly engaged in the transportation of persons or property for compensation upon the waters of this State or upon the high seas, over regular routes between points within this State.*"

We desire to draw particular attention to the fact that the term "common carrier", as used in the Public Utilities Act, includes corporations and persons operating vessels regularly engaged in the transporta-

tion of persons or property for compensation "upon the waters of this state *or upon the high seas*", over regular routes *"between points within this state"*. It is obvious that this language exactly fits the facts of the present proceeding.

Section 2 (bb) of the Public Utilities Act provides in part as follows:

> "The term 'public utility', when used in this act, includes every *common carrier* * * * as those terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the Commission and to the provisions of this act."

The Transportation Company itself must admit that under these constitutional and statutory provisions the State of California has given to the Railroad Commission the undoubted power, in so far as the state could do so, to establish rates for transportation by common carrier between San Pedro and Avalon. Under these provisions, the Railroad Commission has the power and it is its duty to take jurisdiction over complaints such as the one filed before it, unless said provisions of the Constitution and Statutes of California violate the Federal Constitution.

II.

COMMERCE BETWEEN SAN PEDRO AND AVALON IS LOCAL CALIFORNIA COMMERCE AND NOT COMMERCE WITH FOREIGN NATIONS.

A.

It is Local California Commerce.

The Transportation Company bases its case exclusively on the proposition that commerce between San Pedro and Avalon is commerce "with foreign nations". We respectfully submit that this contention is entirely at variance with the ordinary use of the English language and is unsound both in law and in common sense, and that the commerce affected is purely local California commerce.

Both termini are located within Los Angeles County, California. *Ex parte Keil,* 85 Cal. 309.

The facts speak for themselves. The Transportation Company's vessels, when they ply between San Pedro and Avalon cross the high seas for the sole purpose of getting from one point in Los Angeles County to another point in the same county. They do not touch at any other port, either of the United States or of any foreign nation. They do not transfer their passengers or freight to any other vessel or receive the same from any other vessel in their course. Their voyage is unconnected with any railroad company or any other vessel and there is no contention that the goods or passengers transported are being

transported in continuous voyage either to or from any other state or any other nation.

While a portion of the voyage is on the high seas, the navigation thereof is merely incidental to the real purpose of the voyage, which is to ply between two ports, both of which are located in the same county in California.

We shall hereafter consider carefully all the authorities which bear on this question. At this point, we have contented ourselves with setting forth the simple facts, on which facts we confidently believe this Court will hold that the matter, in so far as the establishment of *transportation rates* is concerned, is one purely local to the State of California.

B.

Transportation Company's Contention is Fallacious on Principle.

Notwithstanding what would seem to be the simple common sense of the situation, the Transportation Company insists that commerce between San Pedro and Avalon is "commerce with foreign nations". We contend that this position is fallacious on principle and unsupported by authority, and shall now proceed to consider each of these points.

In considering this question on principle we shall show, first, that the original thirteen states each had complete power over all kinds of commerce; second, that they retained control over commerce such as that now under consideration; third, that the State of California has all the powers over commerce which

the original thirteen states retained, including the power to fix rates for transportation between San Pedro and Avalon.

1. *Original Thirteen States Each Had Complete Power Over Commerce.*

That the original thirteen states, after the Declaration of Independence in 1776, assumed all the powers of independent sovereignties and exercised many thereof, is well known to students of American constitutional history. An examination of the constitutions of these states, adopted between 1776 and 1787, and an investigation into the acts of these states under such constitutions, show that they claimed the power to declare war and make peace, to enter into treaties with each other and foreign nations, to impose and collect customs duties and taxes, to send and receive ambassadors, to maintain armies and navies, to grant letters of marque and reprisal, to establish admiralty courts, and to do other acts which distinctively characterize sovereign nations. These powers were claimed and in part exercised by the thirteen original states prior to 1787, except in so far as by the Articles of Confederation they were delegated to the "Confederacy" known as the "United States of America." That each of these states claimed to be sovereign and independent and to have all the power belonging to independent nations appears from Article II of the Articles of Confederation, adopted on July 9, 1778, reading as follows:

> "Each state retains its sovereignty, freedom and independence and every power, jurisdiction

> and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

While it is true that many of the most important attributes of sovereignty were delegated by the respective states to the Confederacy under certain limitations, it is important to observe that two powers much needed by the central authority, viz., the power to raise money and *to regulate commerce,* were retained by the states.

The power over commerce was one of the most important which was claimed and exercised by these states. Each state claimed complete sovereignty concerning this power. The existence of this power in the several states was one of the main reasons for the creation of the Federal Government. The records of the Congress under the Articles of Confederation for April 30, 1784, show that on said day a resolution was adopted, which resolution, after reciting that

> "The situation of commerce at this time claims the attention of the several states, and few objects of greater importance can present themselves to their notice,"

continues as follows:

> "*Resolved,* That it be, and it is hereby recommended to the legislatures of the several states to vest in the United States in Congress assembled, for the term of fifteen years, with power to prohibit any goods, wares or merchandise, from being imported into or exported from any of the states, in vessels belonging to or navigated by the subjects of any power with whom these states

shall not have framed treaties of commerce." (Laws of the United States, vol. 1, p. 45.)

From a report made to the Congress on October 23, 1786, it appears that none of the states except Delaware had acted in full compliance therewith, although most of them had passed resolutions granting the desired power to Congress, with varying conditions and limitations attached thereto. Nothing further was done in the matter. The necessity for securing the permission of the states shows that at this time the states had complete power over commerce.

The records of the Congress further show that on July 13, 1785, James Monroe presented to Congress a motion to amend paragraph 9 of the Articles of Confederation, so as to vest Congress with the power to regulate trade "of the states as well with foreign nations, as with each other". This resolution was never adopted.

On January 21, 1786, Virginia proposed to the other states a convention of commissioners from the several states to consider measures necessary to enable Congress to regulate commerce. The resolution adopted by the House of Delegates of Virginia recites first and foremost that the commissioners shall take into consideration "the trade of the United States". In response to the invitation of Virginia, five states sent their commissioners to a convention which met in Annapolis on September 11, 1786. While this convention itself accomplished but little, it is well known that it was the precursor of the con-

vention which thereafter met in Philadelphia on the second Monday in May, 1787, and framed the present Federal Constitution.

It is clear that prior to the adoption of the present Federal Constitution, the individual states had complete control over commerce and that they had the undoubted supervision and regulation over commerce upon the high seas between ports within their respective limits.

2. *Original Thirteen States Retained Control Over Commerce Such as That Here Involved.*

On the adoption of the Federal Constitution in 1789, the thirteen original states delegated to the Federal Government *a portion only* of the authority which they had theretofore individually exercised over their commerce. The exact extent of the delegation appears from Article I, Section 8, of the Federal Constitution, reading in part as follows:

> "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

That the states retained all the powers which they did not either directly or by necessary implication confer upon the Federal Government is a principle of constitutional law too firmly established to justify the citation of authorities.

That the commerce now under consideration does not come either within the *language* of Section 8 of

Article I, or within the *mischief intended to be remedied* thereby seems equally clear.

No one will contend that commerce between San Pedro and Catalina Island is commerce "with the Indian tribes".

Neither is it commerce "among the several states". No state other than California is concerned with this commerce.

Neither can it be construed to be commerce "with foreign nations" unless a meaning is given to those words entirely at variance with the English language, as understood by at least nine out of every ten persons who have an ordinary understanding of the language. It is not enough to show, what is undoubtedly the fact, that the word "commerce" includes "intercourse" and "navigation". In order to show that a given transaction constitutes commerce "with foreign nations", it is necessary also to show the "foreign nation" with whom the commerce is conducted. The Transportation Company does not name this "foreign nation", nor can it do so. The transportation here under consideration has nothing to do with any foreign nation, and among the large number of persons to whom we have spoken concerning this problem in the last three years, we have been unable to find a single one, apart from counsel for the Transportation Company, who would admit, as a matter of common sense, that the transportation here at issue can, under any ordinary use of the English language, amount to commerce "with foreign nations".

Referring now to the mischief which Section 8 of Article I of the Constitution was intended to remedy and to our contention that commerce between San Pedro and Avalon does not come within this mischief, we desire to refer this Court to its decision in *County of Mobile* v. *Kimball,* 102 U. S. 691, and in *Lehigh Valley Railroad Company* v. *Pennsylvania,* 145 U. S. 192.

In the *County of Mobile* case this Court, at page 697, said:

> "It is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation *against conflicting and discriminating state legislation.*"

In the *Lehigh Valley Railroad Company* case, Mr. Chief Justice Fuller, in delivering the decision of this Court, at page 200, said:

> "The conflict between the commercial regulations of the several states was destructive to their harmony and fatal to their commercial interests abroad, and this was the mischief intended to be obviated by the grant to the Congress of the power to regulate commerce with foreign nations and among the states."

There can be no conflicting or discriminating state legislation with reference to commerce between San Pedro and Avalon, for the reason that the State of California is alone affected by such commerce, and for the same reason it is clear that the same commerce can present no "conflict between the commercial regu-

" lations of the several states destructive to their har- " mony and fatal to their commercial interests " abroad". Nor can there be conflict with any other nation, for the simple reason that no other nation is affected.

Thus, the commerce under consideration in this proceeding comes neither within the "language" of Section 8 of Article I of the Federal Constitution nor within the "mischief intended to be obviated" by said section.

3. *California Has All the Powers Over Commerce Which Were Retained by the Thirteen Original States.*

That the State of California has all the powers over commerce which the thirteen original states had, except in so far as these powers may have been delegated to the Federal Government by the Federal Constitution, appears from Section 1 of the Act of September 9, 1850, admitting California to the Union (9 Stat. 452), reading as follows:

> Sec. 1. "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the State of California shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union *on an equal footing with the original thirteen states in all respects whatsoever.*"

As the original thirteen states did not give up their power to fix the rates for commerce such as that involved in this proceeding, and as California has all

the powers which the original states retained, it seems clear, on principle, that California must have the right to fix the rates for transportation by common carrier between San Pedro and Avalon.

C.

Transportation Company's Contention is Unsupported by Authority.

While there is language in some of the decisions which can be used to support the Transportation Company's contention that the commerce here under consideration is commerce "with foreign nations", we shall proceed to show that the cases relied on by the Company do not support its contentions. This Court has never rendered a decision applicable to facts such as those now under consideration, contrary to the conclusions hereinbefore deduced from a consideration of the question on principle.

Before analyzing the authorities relied on by the Transportation Company, we desire to dispose of two preliminary points, the first being the necessity of bearing in mind the distinction between the admiralty jurisdiction and the commerce clause of the Federal Constitution, and the second being that the mere fact that a vessel is navigating the high seas by no means gives to the Federal Government control over that vessel in all respects.

1. *Two preliminary points.*

(a) Distinction between admiralty jurisdiction and commerce clause.

A clear distinction must be drawn between ad-

miralty and maritime jurisdiction on the one hand and the so-called commerce clause on the other. Federal jurisdiction over admiralty and maritime matters is conferred by Article III, Section 2, sub-section 1 of the Federal Constitution, reading in part as follows:

> "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

The Federal powers over admiralty and maritime matters thus result from a grant of power to the *judiciary*. On the other hand, the Federal Government's control over commerce, in so far as it has control, flows from a grant of power in Section 8 of Article I to the *legislative department* of the government. The two powers are entirely distinct and should not be confused with one another. There may be matters connected with a vessel upon the high seas which are not cases of "admiralty and maritime jurisdiction", just as clearly as there may be matters connected with a vessel plying exclusively on the rivers of a state and engaged exclusively in state commerce, which nevertheless come under the control of the Federal Government under its "admiralty and maritime jurisdiction".

As was said by Mr. Justice Clifford in *The Befast*, 74 U. S. (7 Wall.) 624, at page 640:

> "Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power to regulate commerce, as conferred by the constitution. *They are entirely different things, having no necessary connection with one another, and are*

conferred, in the constitution, by separate and distinct grants."

The Federal Government's jurisdiction over admiralty matters is limited to such contracts, claims and services as are purely maritime. It covers such matters as collisions between vessels, contracts for hire of seamen, marine insurance, limitation of owners' liability in case of loss, and maritime torts and crimes. This jurisdiction is not limited to tidewaters but extends to all navigable waters of the United States and to vessels which may be engaged in purely intrastate commerce on such waters, in so far as concerns subjects which are clearly of an admiralty and maritime nature.

Providence & N. Y. Steamship Co. v. *Hill Manufacturing Co.*, 109 U. S. 578;
Ex parte Boyer, 109 U. S. 629;
Butler v. *Boston Steamship Co.*, 130 U. S. 527;
In re Garnett, 141 U. S. 1;
The Robert W. Parsons, 191 U. S. 17.

The question of *rates of transportation* is not a *maritime matter.* It is not confined to transportation by water. The principles governing the matter are of equal applicability whether the transportation is by land or by water. It has never been held in any case in so far as we have been able to ascertain, that the matter of rates of transportation may be regarded as an admiralty or maritime matter.

If the distinction between the admiralty and maritime jurisdiction on the one hand and the commerce clause on the other is borne clearly in mind, it will be far easier to determine the weight to be given to

the authorities on which the Transportation Company relies.

(b) Navigation on high seas is not conclusive of Federal control.

We desire also before passing to an analysis of the authorities relied on by the Transportation Company to draw attention to the fact that mere navigation of the high seas by an American vessel does not necessarily give to the Federal Government authority over all acts in connection with such vessel while it is navigating the common highway of all nations. From the Federal control over admiralty and maritime matters, lawyers who are not careful might deduce the conclusion that the Federal Government has control over *all* matters affecting vessels on the high seas; but such conclusion is far from correct. The state in which the vessel is enrolled and in which its owner resides, continues to have important jurisdiction in connection with such vessel while on the high seas. This fact has been clearly established by the decisions.

In *Crapo* v. *Kelly*, 83 U. S. (16 Wall.) 610, an insolvency court in Massachusetts purported to pass to an assignee in insolvency title to a vessel enrolled and owned in Massachusetts, and at the time navigating the Pacific Ocean. The title of the assignee was questioned by an attachment creditor, who attached the vessel when it returned to the State of New York. This Court held that the title of the Massachusetts assignee prevailed, and in expressing this conclusion, uses the following language, at page 624:

> "We are of the opinion, for the purpose we are considering, that the ship 'Arctic' is a part of the territory of Massachusetts, and the assignment by the insolvency court of that state passed the title to her, in the same manner and with the like effect as if she had been physically within the bounds of that state when the assignment was executed."

Likewise, in the case of *Norman* v. *Thompson*, 121 Cal. 620, the Supreme Court of California, in passing on the validity of a purported marriage of residents of California on the high seas in a California vessel, held that the law of California must govern the transaction, and that as the marriage had not been solemnized as provided under the statutes of California, it could not be held to be valid.

It follows from these and similar cases that the mere fact that an American vessel navigates the high seas does not necessarily mean that the states are divested of jurisdiction with respect to all transactions affecting such vessel, and particularly with respect to the rates for transportation solely between two points within the same state.

2. *Analysis of Authorities Relied on by Transportation Company.*

In *Lord* v. *Steamship Company*, 102 U. S. 541, an action was brought against the owners of the steamship "Ventura" to recover the value of a portion of the cargo which was lost when the vessel sank at sea on a voyage between San Francisco and San Diego. The defendant contended that under the provisions of Section 4283 of the Revised Statutes, establishing a

limited liability for the owners of vessels, it was liable only for the value of its interest in the vessel and the freight then pending. The matter was an admiralty matter, clearly under the authority of the Federal Government, under its *admiralty and maritime jurisdiction,* and completely covered by said section of the Revised Statutes. The judgment of the lower Court in favor of the defendant was necessarily affirmed. As is shown by other decisions of this Court, to which we shall hereinafter refer, both before and after the decision in the *Lord* case, the Federal statute on which defendant relied, creating a limited liability for the owners of vessels, was clearly enacted under the admiralty and maritime powers of the Federal Government, and in no way involved the commerce clause. Mr. Chief Justice Waite, however, discussed the question as though it arose under the commerce clause. At page 544 he says:

> "The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore, the 'Ventura' went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was *navigating among the vessels* of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but *she was navigating with them and consequently with them was engaged in commerce.* If, in her navi-

> gation, she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress."

We respectfully contend that the reasoning of the foregoing language is illogical; that it was unnecessary to the decision of the case; that it has been discredited by later decisions of this Court, and that it has no conclusive force in a *rate* case.

We shall refer first to the logic of the reasoning. We shall discuss this question with profound respect but in the light of the fact that this Court itself subsequently discredited the decision. The Chief Justice says, in effect, that the "Ventura" while on the ocean, was "navigating *among* the vessels of other nations", and that while she was not trading with such vessels, she nevertheless was "navigating" with them. He then reaches the conclusion that she "consequently, with them, was engaged in commerce", and then reaches the final conclusion that she was necessarily "while on the ocean, engaged in commerce *with foreign nations*". With all due respect to the Chief Justice, we submit that this language is clearly a logical fallacy. The mere fact that a vessel is sailing on the high seas, which may also be navigated by foreign vessels, is to our minds absolutely inconclusive evidence to show that the vessel is engaged "in commerce with foreign nations". We are unable to understand how a vessel which touches at no foreign

port and takes no persons or commodities from a foreign vessel and delivers no persons or commodities to such vessel, and which plies exclusively between two ports within the same state, without crossing territory belonging to any foreign nation, can be held to be engaged in "commerce with foreign nations".

If this reasoning stands, it must follow that the states have lost their right to regulate the rates of vessels which are engaged on the navigable waters of the state in commerce which is purely state commerce. For if those waters are also traversed by the vessels of foreign nations, as is generally the case, the local vessels will be "navigating *among* the vessels of other nations", and "consequently, we think, will be engaged in commerce", and hence will be engaged in commerce "with foreign nations". We have in mind rivers, such as the Sacramento river and the San Joaquin river, which flow entirely within the limits of the State of California and in which many vessels, whose rates are now regulated by the Railroad Commission of California, are engaged in purely state commerce. Foreign vessels also frequently navigate on these same rivers. If the language of the *Lord* case is to be adhered to, the result will be that the State of California will lose the jurisdiction to establish the rates for purely intrastate commerce, contrary to what has always been believed to be the established law.

Referring now to the point that the language of Mr. Chief Justice Waite with reference to the commerce clause is not necessary to the decision, it will

be sufficient to refer to a number of authorities, both before and after the decision in the *Lord* case, all holding that the owners' limited liability law was passed under the admiralty and maritime jurisdiction of the Federal Government, and that it has nothing to do with the commerce clause. As early as 1871, in *Norwich* v. *Wright,* 80 U. S. (13 Wall.) 104, Mr. Justice Bradley made an exhaustive review of the owners' limited liability laws, beginning with the French Ordonnance de la Marine of 1681, showing clearly that the Federal statute of 1851, establishing the owners' limited liability law, was based on and grew out of the maritime law. No mention whatsoever was made by Mr. Justice Bradley of the commerce clause. In the following cases, prior to the *Lord* case, the distinction between the admiralty and the maritime powers on the one hand and the commerce clause on the other was clearly established; and this Court held that the Federal jurisdiction over admiralty matters cannot be made to depend on the commerce clause:

Genesee Chief, 53 U. S. (12 How.) 443;
Propeller Commerce, 66 U. S. (1 Black) 574;
The Belfast, 74 U. S. (7 Wall.) 624.

The Lottawanna, 88 U. S. (21 Wall.) 558, on which the Transportation Company relies, involved liens for mariners' wages, salvage services and supplies, materials and repairs and had nothing to do with the limited liability law. The casual reference by Mr. Justice Bradley to the limited liability law referred to this law as having been passed as part of

the "maritime law" and there is absolutely nothing in the case which justifies the inference that the limited liability law was passed under the commerce clause.

Subsequent to the *Lord* case, this Court has several time reiterated its conclusion in the earlier cases to the effect that the owners' limited liability law rests on the admiralty and maritime clause of the Federal Constitution and not on the commerce clause.

In *In re Garnett,* 141 U. S. 1, in which case a cargo of cotton was burned while being transported on the "Lawton" between Augusta and Savannah, both on the Savannah river, in Georgia, Mr. Justice Bradley held that the owners' limited liability law applied, although the commerce was purely state commerce. It is clear that this decision could not have been reached if the limited liability law is based on the commerce clause. Referring to this point, Mr. Justice Bradley, at page 12, said:

> "It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations and among the several states, in order to find authority to pass the law in question. The act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is co-extensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends. The subject has frequently been up for consideration by this court for many years past, and but one view has been expressed."

In *Providence and New York Steamship Co.* v. *Hill Manufacturing Co.,* 109 U. S. 578, Mr. Justice Bradley, at page 593, said:

> "The rule of limited liability prescribed by the act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England from time immemorial; and if this were not so, the subject matter itself is one that belongs to the department of maritime law."

In *Ex parte Boyer,* 109 U. S. 629, this Court held that the limited liability law applied to a collision in the Illinois and Lake Michigan Canal, between vessels which were moving between two Illinois ports, in Illinois state business. At page 632, Mr. Justice Blatchford said:

> "It makes no difference as to the jurisdiction of the District Court that one or the other of the vessels was at the time of the collision on a voyage from one place in the state of Illinois to another place in that state. *The Belfast,* 7 Wall. 624."

It is clear that in the *Boyer* case, also, the owners' limited liability law could not have been held applicable if that law were founded on the commerce clause, for the reason that the commerce was state commerce.

See, also, to the same effect, *Butler* v. *Boston Steamship Co.,* 130 U. S. 527, in which case Mr. Justice Bradley, at page 555, said:

> "The law of limited liability, as we have frequently had occasion to assert, was enacted by

> Congress *as a part of the maritime law* of this country."

While the language of the *Lord* case has been indirectly weakened by the decisions of the later cases, all holding that the commerce clause has nothing to do with the owners' limited liability law, the case was directly discredited by this Court by immediate reference thereto in *Lehigh Valley R. Co.* v. *Pennsylvania,* 145 U. S. 192. This was a case involving the power of the State of Pennsylvania to impose a tax on that portion of the receipts of an interstate railroad which represented the mileage moved within the State of Pennsylvania. Referring to the *Lord* case, Mr. Chief Justice Fuller said, at page 203:

> "The single question in *Lord* v. *Steamship Company,* was as stated by Mr. Justice Waite, delivering the opinion of the court, whether Congress had power to regulate the liability of the owners of vessels navigating the high seas, to engage only in the transportation of goods and passengers, between ports and places in the same state, it being conceded that the voyages of the steamship in respect of whose loss the question arose were always ocean voyages."

After quoting the language of the case with reference to commerce with foreign nations, which language has hereinbefore been set out in full, Mr. Chief Justice Fuller, at page 203, continued as follows:

> *"But it was unnecessary to invoke the power to regulate commerce in order to find authority for the law in question. As stated by Mr. Justice Bradley in re Garnett 141 U. S. 1: 'The act of Congress which limits the liability of ship*

owners was passed in the amendment of the maritime law of the country, and the power to make such amendments is co-extensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends.' In that case the limited liability act was applied to a steamer engaged in commerce on the Savannah River."

It thus appears that this Court, in its later decision in the *Lehigh Valley* case, was unwilling to follow the reasoning of Mr. Chief Justice Waite in the *Lord* case, in so far as concerns the language as to commerce with foreign nations. While this language was entirely superfluous, as is shown by the decisions of the Supreme Court both before and after the *Lord* case, the decision in the *Lord* case was correct, for the reason that under the admiralty and maritime power, Congress clearly had the right to pass the owners' limited liability law.

Before leaving the *Lord* case we desire to draw the attention of this Court to the fact that that case had nothing whatsoever to do with the fixing of *transportation rates* and that the only issue involved affected a maritime matter entirely disconnected from the establishment of transportation rates.

In *Pacific Coast Steamship Co.* v. *Board of Railroad Commissioners,* 18 Fed. 10, decided in 1883, the Pacific Coast Steamship Company secured from the United States Circuit Court for the District of California an injunction to restrain the Board of Railroad Commissioners from establishing rates of charges to

be collected by the steamships of the plaintiff plying between ports in the State of California.

The decision rests entirely upon the erroneous dictum in the *Lord* case, hereinbefore referred to. It is the decision of an inferior court and no appeal was ever taken. The decision was rendered long before this Court, in the *Lehigh Valley* case, *supra,* expressed its more mature views with reference to the dictum in the *Lord* case, and long before the State of California clearly expressed its intention to exercise the power herein involved, as it did in the Public Utilities Act of 1911. Also, the defendants do not seem to have urged upon the Court the point that the commerce was local California commerce, and that even if the Federal Government had the right to regulate the same, the State of California might proceed until the Federal Government acted. Under these circumstances, the case is of little authority.

In *Hanley* v. *Kansas City Southern Railway Co.,* 187 U. S. 617, this Court affirmed a decree of the Circuit Court granting an injunction to restrain the Railroad Commissioners of Arkansas from establishing and enforcing rates for traffic moving from one point in Arkansas, over a distance of 64 miles through the Indian Territory and thence returning into Arkansas. This Court considered the Indian Territory as coming within the definition of the words "among the several states", in the same way in which this Court has frequently construed the word "states" as used in the Federal Constitution, to include a "territory", and held that the movement fell within that

portion of Section 8 of Article I of the Federal Constitution which gives to the Federal Government the power to regulate commerce "among the several states".

The decision, which is undoubtedly correct, was based on *Wabash St. L. and P. R. Co.* v. *Illinois,* 118 Fed. 557, and the other cases holding that a state has no power to regulate the rates for any part of an interstate rail transportation. The basic principle underlying these cases was carefully expressed by this Court in *Port Richmond and Bergen Point Ferry Company* v. *Board of Chosen Freeholders of the County of Hudson,* 234 U. S. 317, at page 331, as follows:

> "Considering the conditions of interstate railroad transportation, which might extend not only from one state to another, but through a series of states, or across the continent, and the consequences which would ensue if each state should undertake to fix rates for such portions of continuous interstate hauls as might be within its territory, the conclusion was reached that 'this species of regulation' was one 'which must be, if at all, of a general and national character', and could not be 'safely and wisely remitted to local rules'."

The decision in the *Hanley* case was based upon the clause "among the several states" in Section 8 of Article I of the Federal Constitution, and cannot properly be cited to prove that any given commerce is commerce "with foreign nations".

Furthermore, the reasoning in the *Hanley* case is

not applicable to the present proceeding. At page 620 the Court said:

> "No one contends that the regulation could be split up according to the jurisdiction of state or territory over the track, or that both state and territory may regulate the whole rate. *There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress.*"

This reason for the rule in the *Hanley* case has no application whatsoever in the present case. There is here no other state and no other nation which can possibly lay claim to any right to establish the rate in question. There is only one authority interested, and that authority is the State of California. The State of California is the only sovereignty which can have the power to establish the rate unless the Federal Government has the power and has exercised it.

The Transportation Company, in its brief (pp. 20-21), seeks to draw an analogy between the *Hanley* case and the present case on the ground that in each case the commerce moves over a portion of its route through territory belonging to some sovereign other than the one which is undertaking to establish the rate. This contention is absolutely erroneous, in so far as the present case is concerned, for the reason that the high seas belong to *no* nation and to no set of nations. While it is sometimes said that the high seas are the common property of all nations, all that it is meant to say is, that the vessels of all nations have the right to the *use* of the high seas in common. Although formerly certain nations claimed a property right in certain portions of the high seas, it is now

established that the high seas cannot become the *property* of any one nation or of any set of nations.

Woolsey, in his treatise on *International Law,* Section 59, expresses the principle as follows:

> "The high sea is free and open to all nations. It cannot become the property or the empire of a particular state. It cannot become *property,* for it cannot be possessed, or have any personal action exercised upon it, which must prevent a similar action by another."

Boyd, in his edition of *Wheaton's International Law,* says, in paragraph 106:

> "Though there can be no doubt about the jurisdiction of a nation over the persons who compose its fleets when they are out at sea, it does not follow that the nation has jurisdiction over any portion of the ocean itself. It is not a permanent property which it acquires, but a mere temporary right of occupancy in a place which is common to all mankind, to be successively *used* by all as they have occasion."

Oppenheim, in his recent work on *International Law,* vol. 1, page 195, expresses the principle as follows:

> "As the open sea is not under the sway of any state, no state can exercise its jurisdiction there. But it is a rule of the law of nations that the vessels and the things and persons thereon remain during the time they are on the open sea under the jurisdiction of the state under whose flag they sail."

Wheaton, in the original edition of his book on *International Law,* states that in naval warfare the

enemy's property may be taken either in a place belonging to a belligerent *"or in a place belonging to no one"*, and adds that *"the ocean constitutes such a place"*.

We deem it unnecessary to quote further authorities on a point so clearly established or to draw further attention to the point that in sailing over the high seas directly between San Pedro and Avalon, a vessel neither sails over nor touches nor in any way has anything to do with any territory belonging to any foreign nation.

In the *Abby Dodge,* 223 U. S. 166, a libel was brought against the vessel "Abby Dodge" to forfeit her or to enforce a money penalty, for a violation of an act of Congress of June 30, 1906, making it unlawful to land sponges in ports of the United States during certain seasons of the year. The libel charged that the "Abby Dodge" had landed at Tarpon Springs, Florida, 1229 bunches of sponges taken from the waters of the Gulf of Mexico and the Straits of Florida, at a time of the year which, under the statute, was unlawful. The libel did not say whether the sponges were taken within or without the waters of the State of Florida. Mr. Chief Justice White, in delivering the opinion of the Court, accordingly reversed a decree imposing a forfeiture. The Court intimated that the libel would be sustained if the sponges were taken on the high seas beyond the limits of the State of Florida. Referring to this point, the Court said, at page 176:

> "Undoubtedly (*Lord* v. *Steamship Company*, 102 U. S. 541), whether the 'Abby Dodge' was a vessel of the United States or of a foreign nation, even though it be conceded that she was solely engaged in taking or gathering sponges in the waters which by the law of nations would be regarded as the common property of all and was transporting the sponges so gathered to the United States, the vessel was engaged in foreign commerce, and was therefore amenable to the regulating power of Congress over that subject. This not being open to discussion, the want of merit of the contention is shown, since the practices from the beginning, sanctioned by the decisions of this court, establish that Congress by an *exertion* of its power to regulate foreign commerce has the authority to forbid merchandise carried in such commerce from entering the United States."

This was not a rate case, and this Court did not say that the "Abby Dodge" was engaged in commerce "with foreign nations". It appears reasonable enough to conclude that in taking sponges from the high seas and outside the limits of any state and transporting them to the United States, the vessel was engaged in "foreign", as distinguished from strictly "domestic" commerce. It is an entirely different thing to say that the vessel was engaged in commerce "with foreign nations", for the reason that no other nation was involved.

The decision in the *Abby Dodge* case is undoubtedly correct under the authorities holding that the Federal Government has the right to prevent the transportation into the national territory or persons or property deemed deleterious. We venture

also to suggest that the decision is correct under the power which the National Government has over fisheries under its admiralty and maritime jurisdiction. The case was one in which the Federal Government had clearly *exerted* its jurisdiction and cannot reasonably be urged as authority in a case in which the Federal Government has taken no action.

We believe we have now disposed of all the authorities relied on by the Transportation Company on the question whether the commerce here under consideration is commerce "with foreign nations" except the authorities on pages 12 to 17 of the Transportation Company's brief, to the effect that commerce includes "intercourse" and "navigation", and the authorities appearing on pages 17 to 20 of the Transportation Company's brief, to the effect that the Federal Government is charged with the exclusive responsibility and control of relations and intercourse with foreign nations.

The first point is conceded, but has no bearing on the present case, for the reason that it is not shown that the commerce here under consideration is commerce "with foreign nations". The mere substitution of the word "intercourse" or the word "navigation" for the word "commerce" is not sufficient to convert into commerce "with foreign nations" a voyage which in no way affects the territory of any foreign nation, and which is simply conducted between two local California ports by way of the high seas.

The authorities relied on in support of the second propositon merely hold that the Federal Govern-

ment has the right, under its power as a sovereign, to prevent undesirable persons from entering the territory and to regulate relationships with foreign nations. In so far as is necessary, under the admiralty and maritime law or under international law, the Federal Government has, of course, the right to regulate vessels plying between San Pedro and Avalon. But it is the clearest kind of a *non sequitur* to say that for this reason the Federal Government has the further right to regulate these vessels in a matter such as transportation rates in which no foreign nation is in any way concerned. Where the reason for the rule fails, the rule itself, of course, also fails.

We have now considered all the cases and arguments of any moment on which the Transportation Company relies on the question whether the commerce under consideration is commerce "with foreign nations". These cases, to our minds, leave unchanged the simple logic of the situation. As we have hereinbefore shown, the states of this Union originally had the power to regulate commerce between points within their limits, even if that commerce in a portion of its course traversed the high seas. The states of the Union at present still have that power, unless it has been delegated to the Federal Government. In so far as concerns admiralty and maritime jurisdiction, it is clear that the Federal Government now has complete power. It is equally clear that the case now before this Court is not such a case. With reference to commerce, the

Federal Government has power only if it is commerce "with the Indian tribes" or "among the several states" or "with foreign nations". That the commerce here under consideration falls within none of these classes is too clear for further argument.

We accordingly submit that the power to regulate such commerce in a non-admiralty matter, such as the establishment of rates of transportation, vests exclusively in the State of California.

III.

EVEN IF THIS IS COMMERCE WITH FOREIGN NATIONS, CALIFORNIA MAY REGULATE THE RATES OF TRANSPORTATION BECAUSE THE FEDERAL GOVERNMENT HAS FAILED TO ACT.

A.

Federal Government Has Failed to Act.

That the Federal Government has failed to act in the matter of the rates of commerce wholly by water is clear.

> *In the Matter of Jurisdiction over Water Carriers,* 15 I. C. C. Reports 205;
> *Mutual Transit Co.* v. *United States,* 178 Fed. 664, 666.

The Interstate Commerce Act in no way refers to the rates for transportation by *water* except in case of a common arrangement or control between a water carrier and a rail carrier. The case before this Court is not such a case.

The act approved August 24, 1912, known as the *Panama-Pacific Act,* amends Section 5 of the Interstate Commerce Act so as to give to the Interstate Commerce Commission the power, with reference to the *combined movements by rail and water,* to establish physical connections, through routes and maximum joint rates, and maximum proportional rates by rail. No power, however, was conferred with reference to movements by water only.

The Transportation Company in its brief, for the first time, makes the claim that the Federal Government, by providing for the licensing and enrolment of vessels engaged in the coasting trade, has precluded the State from regulating the rates for transportation by such vessels. We submit that this claim is absolutely without foundation. The licensing and enrolment of vessels is a thing entirely apart from the establishment of rates of transportation. There is no connection between the two, nor can action in one field be taken to affect in any way the other.

This same claim that the passage of the licensing and enrolment statutes precludes state action with reference to the vessels, was made by counsel and conclusively answered by this Court in *Smith* v. *Maryland,* 59 U. S. (18 How.) 71. In that case this Court upheld a statute of Maryland regulating fishing for oysters in her waters, even as against vessels licensed and enrolled under the Federal statutes and engaged in interstate commerce. At page 74, Mr. Justice Curtis states the argument of counsel as follows:

> "It was argued that it (the Maryland statute) is repugnant to that clause of the Constitution which confers power on Congress to regulate commerce, because it authorizes the seizure, detention and forfeiture of a vessel enrolled and licensed for the coasting trade, under the laws of the United States, while engaged in that trade."

Mr. Justice Curtis then states the answer as follows:

> "But such enrolment and license confers no immunity from the operation of a valid law of a State. If a vessel of the United States, engaged in commerce between two states, be interrupted therein by a law of a State, the question arises whether the State had power to make the law by force of which the voyage was interrupted. This question must be decided, in each case, upon its own facts. If it be found, as in *Gibbon* v. *Ogden,* 9 Wheat. 1, that the State had not power to make the law, under which a vessel of the United States was prevented from prosecuting its voyage, then the prevention is unlawful. But a State may make valid laws for the seizure of vessels of the United States. Such, among others, are quarantine and health laws."

We conclude that neither by passing the laws for the enrolment and licensing of vessels engaged in the coasting trade nor in any other way has the Federal Government entered the field of rate regulation for vessels not engaged in continuous or combined movement by rail and water.

Consequently, if California does not have power over the rates in question, no governmental authority has such power. If this is the law, the Transporta-

tion Company, although it is a common carrier, engaged in the transportation of persons and property for hire, will be free from all governmental regulation as to its rates. It will be able to extort such rates as it pleases and to discriminate between different shippers *ad libitum,* without relief through action by any governmental authority. We believe that this Court will be slow to reach such a conclusion unless under the authorities it is compelled to do so.

B.

In Matters of Local State Interest, Not Necessitating a Uniform Rule, the State May Act in the Absence of Federal Legislation.

1. *State Against Federal Regulation of Commerce.*

As bearing on the question of State or Federal control over commerce, the decisions have established three classes of cases:

(1) Those in which the power of the State is exclusive;

(2) Those in which the State may act in the absence of legislation by Congress;

(3) Those in which the power of Congress is exclusive and the states cannot interfere at all.

These three classes are tersely stated by Mr. Justice Brown in *Covington and Cincinnati Bridge Co.* v. *Commonwealth of Kentucky,* 154 U. S. 204, at page 209, as follows:

> "The adjudications of this Court with reference to the power of the states over the general

> subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all."

The classes are so thoroughly established that it is unnecessary to refer to further authorities.

Heretofore, we have contended, and we still contend, that the commerce under discussion is not commerce "with foreign nations". We shall now go a step further. Even if we assume, for the sake of the argument, that the commerce here under consideration is commerce "with foreign nations", it nevertheless follows, under the decisions of this Court, as we shall hereinafter show, that the present case is one which falls under the second rule stated by Mr. Justice Brown. It is a case in which the states may act in the absence of legislation by Congress. Until the Federal Government occupies the field, the State of California has the right to continue to establish the transportation rates in question.

2. *Tests Proposed by Transportation Company to Determine Cases in which States May Act in the Absence of Legislation by Congress are Unsatisfactory and Inadequate.*

The Transportation Company in its brief has proposed certain tests to determine the cases in which, while the Federal Government has the ultimate power to act with reference to commerce, the states may nevertheless act until Congress exerts its power.

As we shall now show, none of these tests is adequate or satisfactory. The Transportation Company absolutely fails to point out the one basic, fundamental test, which has been recently reiterated by this Court in a number of notable decisions, and on which test alone the cases may be reconciled. After having disposed of the Transportation Company's tests, we shall explain what we believe to be the only basic, fundamental test.

The Transportation Company first proposes the test of direct action upon interstate or foreign commerce as distinguished from indirect action on the instruments and instrumentalities of such commerce. The Transportation Company contends that in the absence of action by the Federal Government, the states may act on the instruments and instrumentalities of interstate commerce, in matters such as the regulation of locomotive headlights, the heating of interstate trains and similar matters. The Transportation Company, however, contends that the states cannot, in any event, "regulate" or "act directly upon" interstate commerce. It is undoubtedly true that in a number of cases the application of this test produced a result which was correct on the facts of the case. It is equally true that this test fails to take care of many other cases, and that it is not the basic and fundamental test.

What could be a more direct action on interstate commerce than an order absolutely preventing such commerce from coming within the bounds of a State? Nevertheless, this Court has held that a

State has the right absolutely to prevent the importation of cattle if they are diseased.

Rasmussen v. *Idaho,* 181 U. S. 198;
Reid v. *Colorado,* 187 U. S. 137;
Asbell v. *Kansas,* 209 U. S. 251.

What could be a more direct regulation of interstate commerce than a state order directing that interstate freight trains should not run on Sunday? Nevertheless, this Court, in *Hennington* v. *Georgia,* 163 U. S. 299, sustained a state statute to this effect. Is not a state order directing that the owners of oysters, engaged in interstate commerce, shall pay a fee for the inspection thereof, an order acting directly on interstate commerce? Nevertheless, this Court, in the very recent case of *Foote* v. *Stanley,* 232 U. S. 494, held that a state order of this kind, if confined to the inspection of oysters, would be valid and "that interstate commerce is to that extent *lawfully* burdened". In other words, this Court clearly held that the test is not whether interstate commerce is burdened, but whether it is *"lawfully"* burdened, and in order to ascertain whether it is "lawfully" burdened, it is necessary to look to a more basic and fundamental test than any which the Transportation Company has suggested.

This Court, in the very recent and leading case of *Port Richmond and Bergen Point Ferry Company* v. *Board of Chosen Freeholders of the County of Hudson, supra,* accurately points out at page 332 that "quarantine and pilotage regulations may be said to be quite as direct in their operation" as orders estab-

lishing rates, but as the authorities hereinafter cited will show, this Court has again and again sustained state regulations, both of quarantine and of pilotage.

It is obvious from these cases and many more to which reference might be made, that this test proposed by the Transportation Company, although it undoubtedly led to proper results in a number of cases, is not the ultimate test.

The Transportation Company further insists on another test, which depends upon whether or not the state order amounts to a "burden" upon commerce. Admittedly, language of this kind will be found in many of the cases with the decisions of which we thoroughly agree. But a number of the illustrations which we have given in connection with the preceding test show clearly that this test also is not the fundamental test. Otherwise, the cases on quarantine and inspection laws would have been wrongly decided. While this test will, in most cases, produce the correct result, this follows not from the fact that the test is in itself correct, but rather from the fact that in most cases in which burdens are imposed upon interstate commerce, the states are trying to regulate or restrain that which, from its nature, should be under the control of a single authority, and be free from restrictions save as it is governed by a valid Federal rule.

> *Port Richmond and Bergen Point Ferry Co.* v. *Board of Chosen Freeholders of the County of Hudson,* 234 U. S. 317, 331.

The same principle was expressed by this Court in

the *Minnesota Rate* case, 230 U. S. 352, where, at page 400, Mr. Justice Hughes uses the following language:

> "The principle, which determines this classification, underlies the doctrine that the states cannot under any guise import direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature should be *under the control of the one authority* and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains."

The Transportation Company further proposes as a test that we look to the territorial limits of the state and that we make these limits the test. In our opinion, this test is absolutely without justification. The Federal Government has jurisdiction in certain cases over commerce which may be confined exclusively within the limits of a state, just as the State government may have the power to act as to commerce which goes beyond the state limits, if the matter is one which does not demand uniformity of regulation and which is of a purely local concern.

It has always been held that the Federal Government has the right to regulate commerce "with the Indian tribes", even if such commerce is entirely intrastate commerce. Likewise, this Court has consistently held that until the Federal Government exerts its authority, the states may act if the matter is of a local character and does not demand a uniform rule or regulation from the nation. And in a number of recent cases, particularly *Port Richmond and*

Bergen Point Ferry Co. v. *Board of Chosen Freeholders of the County of Hudson, supra,* and *City of Sault Ste. Marie* v. *International Transit Co.,* 234 U. S. 333, the Court has, with perfect consistency, applied this principle to a case in which the commerce, while interstate in the one case and "with foreign nations" in the other, was nevertheless local in character and not such as to demand a uniform rule.

It is thus evident that none of the tests proposed by the Transportation Company are fundamental, and that it will be necessary to go deeper than the Transportation Company has done.

3. *The Basic Principle in Determining Whether the States May Act Until the Federal Congress Acts is That in Those Subjects Which Require a General System or Uniformity of Regulation, the Power of Congress is Exclusive, But That in Other Matters Admitting of Diversity of Treatment According to the Special Requirements of Local Conditions, the States May Act Until Congress Sees Fit to Act.*

We confidentially assert that this principle is the basic and fundamental principle underlying all the cases and that on this principle alone can they all be reconciled. After a most searching inquiry into all the cases bearing on this question, this Court, in a series of recent cases, notably the *Minnesota Rate* case, *supra,* and the *Point Richmond and Bergen Point Ferry Co.* case, *supra,* has definitely established

this test as the basic and fundamental test to be applied in all cases of this kind, and in view of this conclusion, reached by this Court, after the most careful consideration, we submit that there should be no possibility of any further successful contention to the contrary.

Without referring to all the cases establishing this test, we desire to present the leading cases on the subject.

The first case is the famous case of *Cooley* v. *Board of Wardens,* 12 How. 299. In this case, at page 318, this Court said:

> "Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation."

Again, on page 319, this Court said:

> "Whatever subjects of this power are in their nature national, or admit of only one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

Applying these principles, this Court held that pilotage laws were matters of local concern not requiring a uniform rule throughout the country and that the pilotage laws of Pennsylvania establishing pilotage fees were valid even as to vessels engaged in commerce "with foreign nations".

In *Gilman* v. *Philadelphia,* 70 U. S. (3 Wall.) 713, this Court, speaking through Mr. Justice Swayne, at page 726, said:

> "The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operations to such localities respectively. To this extent the power to regulate commerce may be exercised by the states."

In *Ex parte McNeil,* 80 U. S. (13 Wall.) 236, in which case this Court sustained the pilotage laws of New York, Mr. Justice Swayne, after referring to powers which may be exercised by the states, but only until Congress shall see fit to act upon the subject, at page 240, said:

> "The commercial power lodged by the Constitution in Congress is, in part, of this character. Some of the rules prescribed in the exercise of that power must, from the nature of things, be uniform throughout the country. To that extent the power itself must, necessarily, be exclusive; as much so as if it had been declared to be, by the organic law, in express terms. Others may well vary with the varying circumstances of different localities. In the latter contingency, the states may prescribe the rules to be observed until Congress shall supersede them; the Constitution and laws of the United States in such case, as in all others to which they apply, being the supreme law of the land."

In *County of Mobile* v. *Kimball,* 102 U. S. 691, this Court, at page 698, said:

> "The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended for cases where such uniformity was practicable. Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority."

In this case this Court held that the improvement of harbors, bays and navigable rivers within the states falls within the class of cases in which the state may act until the Federal Government legislates.

In *Cardwell* v. *American Bridge Company,* 113 U. S. 205, this Court, in sustaining the right of California to provide for the construction of a bridge across the American river, at page 210, said:

> "These cases (*Willson* v. *Black Bird Creek Marsh Co.,* 2 Pet. 245, and *Gilman* v. *Philadelphia,* 3 Wall. 713), illustrate the general doctrine, now fully recognized, that the commercial power of Congress is exclusive of state authority only when the subjects upon which it is exerted are national in their character and admit and require uniformity of regulations affecting alike all the states; and that when the subjects within

that power are local in their nature or operation or constitute mere aids to commerce, the state may provide for their regulation and management until Congress intervenes and supersedes their action."

In *Bowman* v. *Chicago and Northwestern Railway Co.,* 125 U. S. 465, this Court, speaking through Mr. Justice Matthews, re-examined the entire question. This Court's matured conclusions are expressed at page 481, as follows:

"The distinction between cases in which Congress has exerted its power over commerce, and those in which it has abstained from its exercise, as bearing upon state legislation touching the subject was first plainly stated by Mr. Justice Curtis in the case of *Cooley* v. *Port Wardens,* 12 How. 299, and applies to commerce with foreign nations as well as to commerce among the states. In that case, speaking of commerce with foreign nations, he said (p. 319): 'Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation'. It was, therefore, held in that case that the laws of the several states concerning pilotage, *although in their nature regulations of foreign commerce,* were, in the absence of legislation on the same subject by Congress, valid exercises of power."

Mr. Justice Matthews then continues as follows:

"The subject was *local* and not *national,* and was likely to be best provided for, not by one

> system or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the *local* peculiarities of the ports within their limits; and to do this it may be added that it was a subject imperatively demanding positive regulation. The absence of legislation on the subject, therefore, by Congress was evidence of its opinion that that matter might be best regulated by *local* authority, and proof of its intention that *local* regulations should be made."

We desire now to refer to two very recent cases in which this Court, after exhaustively reviewing all the authorities, reaffirms the principle announced in *Cooley* v. *Board of Wardens, supra,* and the subsequent cases, and definitely and conclusively decides that the basic and fundamental test to be applied is whether the subject is one which requires a general system or uniformity of regulation demanding action by the Federal Government or whether it is one of local importance, which can be handled by the states until the Federal Government, if it chooses to do so, exerts its authority.

In the *Minnesota Rate* case, *supra,* after a careful review of all the authorities, this Court, speaking through Mr. Justice Hughes, at page 399, said:

> "The grant in the Constitution of its own force, that is, without action by Congress, establishes the essential immunity of interstate commercial intercourse from the direct control of the states *with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority."*

We desire to draw attention particularly to the fact that interstate commercial intercourse is not withdrawn *in its entirety* from the *direct control* of the states, as claimed by the Transportation Company herein, but that only those subjects are withdrawn "which are of such a nature as to demand, if regulated at all, their regulation should be prescribed *by a single authority*". This Court then proceeded as follows:

> "It has repeatedly been declared by this Court that as to those subjects which require a *general system or uniformity of regulation* the power of Congress is exclusive. *In other matters, admitting of diversity of treatment according to special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and when Congress does act, the exercise of its authority overrides all conflicting state legislation. Cooley* v. *Board of Wardens,* 12 How. 299, 319; *Ex parte McNiel,* 13 Wall. 236, 240; *Welton* v. *Missouri,* 91 U. S. 275, 280; *County of Mobile* v. *Kimball,* 102 U. S. 691, 697; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 204; *Bowman* v. *Chicago, etc., Ry. Co.,* 125 U. S. 465, 481, 485; *Golf, Colorado & Santa Fe Ry. Co.* v. *Hefley,* 158 U. S. 98, 203, 104; *Northern Pacific Ry. Co.* v. *Washington,* 222 U. S. 370, 378; *Southern Railway Co.* v. *Reid,* 222 U. S. 224, 436."

This Court, at page 400, then continues to show that this basic test underlies the doctrine that the states can not under any guise import direct burdens upon interstate commerce:

> "The principle, which determines this classification, *underlies the doctrine* that the states can not under any guise import direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains."

Finally, on this point, this Court, at page 402, said:

> "Where the subject is peculiarly one of *local concern,* and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for *local needs,* it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituted laws of its own. The successful working of our constitutional system has thus been made possible."

Finally, we desire to refer to *Port Richmond and Bergen Point Ferry Company* v. *Freeholders of Hudson County,* 234 U. S. 317, decided by this Court on June 8, 1914. In this case, the Board of Chosen Freeholders of the County of Hudson, New Jersey, established the rate to be charged by ferry for the trans-

portation of foot passengers for single trips from New Jersey to Staten Island, New York, and for round trips to the New York terminal and return. The plaintiff in error before this Court contended that the action of the Board was void, for the reason that the transportation is interstate and that the fixing of the rates therefor is a direct regulation of interstate commerce and hence void.

This Court frankly stated that the transportation was clearly interstate commerce, and that the question to be decided was whether the State of New Jersey had the right to regulate the rates to be charged for a trip by ferry commencing in New Jersey and ending in New York, at a point outside of the territorial limits of the State of New Jersey. After reviewing the authorities cited by plaintiff in error, most of which are relied upon by the Transportation Company in this case, this Court, at page 330, expressed its conclusion with reference to the basic test to be applied in cases of this kind, as follows:

> "Coming then to the question now presented—whether a state may fix reasonable rates for pilotage from its shore to the shore of another state—*regard must be had to the basic principle involved.* That principle is, as repeatedly declared, that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive; that, in other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and that, when Congress does act, the exercise of its authority overrides all conflicting state legislation." (Citing a large number of leading cases.)

This Court then continued as follows:

> "It is this principle that is applied in holding that a state may not impose direct burdens upon interstate commerce, for this is to say that the states may not directly regulate or restrain that which from its nature should be free from restriction save as it is governed by valid Federal rule. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 204."

Referring then specifically to the question at issue, this Court, at page 331, continued as follows:

> "*The present question is simply one of reasonable charges.* It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates, because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. Quarantine and pilotage regulations may be said to be quite as direct in their operation, but they are not obnoxious when not in conflict with Federal rules. *The fundamental test, to which we have referred, must be applied; and the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power over these numerous ferries across boundary streams; whether, in view of the character of the subject and the variety of regulation required, it is one which demands the exclusion of local authority.* Upon this question we can entertain no doubt."

In replying directly to the argument that the state has no power to establish the *rates* for an *interstate movement,* this Court then continued as follows:

> "It has never been supposed that because of the absence of Federal action the public interest was unprotected from extortion, and that in order to secure reasonable charges in a myriad of such different local instances, exhibiting an endless variety of circumstances, it would be necessary for Congress to act directly, or to establish for that purpose a Federal agency. The matter is illuminated by the consideration of this alternative, for the point of the contention is that, there being no Federal regulation, the ferry rates are to be deemed free from all control. The practical advantages of having the matter dealt with by the states are obvious, and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will, of course, control."

This Court thus held, directly contrary to the contentions of the Transportation Company in the present case, that, in the absence of Federal legislation, the state may establish the rates to be charged even in interstate commerce, provided that the facts of the particular case are such as to show that the matter is one primarily of local importance and that there is no necessity for a uniform system of regulation and for exclusive national control.

The Transportation Company devotes almost 25 pages of its brief in this case to a frantic effort to try to distinguish the *Port Richmond and Bergen Point Ferry Company* case or to induce this Court to recede from its reasoning therein. We do not deem it necessary to reply to these appeals, for the reason that it is perfectly obvious that the decision in this

case is the result of the most painstaking study and investigation on the part of the members of this Court, that it was reached only after a consideration of all the authorities bearing on the question, and that it rests on the solid foundation which underlies all the cases on the commerce clause decided by this Court.

We respectfully suggest that the decision in the *Port Richmond and Bergen Point Ferry Company* case is conclusive in favor of our contentions herein. If transportation between New Jersey and New York, clearly involving two states, is a matter of local concern, how much more is transportation between two points in the same county in the same state a matter of local concern justifying state regulation of the rates, at least until Congress acts? And if the state has the power, in order to prevent extortionate rates, to regulate the rates to be charged by ferry between New Jersey and New York, in competition with other ferries and means of transportation between New Jersey and New York, then, much more should the State of California have the right to establish the rates for transportation between San Pedro and Catalina Island, when it appears, as it does by the admitted allegations of the complaint herein, that the Transportation Company "is the only common carrier of persons or freight whose vessels ply between the said two ports"? (Record, p. 13.) If New Jersey was justified, in the absence of Federal legislation, in regulating the rates of a ferry under competitive conditions, then how much more is California justified in regulating the rates, between two points in one of her counties, of a line of vessels which have a *monopoly* of the business?

4. *Decisions Are All Explained by this Fundamental Test.*

Whatever may be the language used in the many decisions of this Court dealing with the regulation of interstate and foreign commerce, which language has not always been the same, the actual decisions are all explained by the fundamental test which this Court reaffirmed in the *Minnesota Rate* case, *supra,* and in the *Port Richmond and Bergen Point Ferry Company* case, *supra.*

Without pausing to analyze the cases, we shall content ourselves by drawing attention to some of the more important of the many cases in which state action affecting interstate commerce has been sustained by this Court in the absence of Federal legislation. Most of these cases were referred to in the *Minnesota Rate* case, *supra,* as illustrating this Court's conclusion that where the matter is primarily one of local concern, the state action will be upheld in the absence of Federal legislation.

In the absence of Federal legislation, the states may—

(a) Regulate pilotage.

Cooley v. *Board of Wardens,* 12 How. 299;
Steamship Company v. *Joliffe,* 69 U. S. (2 Wall.) 450;
Ex parte McNiel, 80 U. S. (13 Wall.) 236;
Anderson v. *Pacific Coast Steamship Co.,* 225 U. S. 187.

(b) Protect their coasts, improve their harbors, bays and streams, and construct dams and bridges across navigable rivers—

Willson v. *Black-bird Creek Marsh Co.*, 27 U. S. (2 Pet.) 245;
Gilman v. *Philadelphia*, 70 U. S. (3 Wall.) 713;
Pound v. *Turk*, 95 U. S. 459;
County of Mobile v. *Kimball*, 102 U. S. 691;
Escanaba Company v. *Chicago*, 107 U. S. 678;
Cardwell v. *American Bridge Co.*, 113 U. S. 205;
Huse v. *Glover*, 119 U. S. 543, 547;
Willamette Iron Bridge Co. v. *Hatch*, 125 U. S. 1;
Lake Shore and Michigan Central Railway Co. v. *Ohio*, 165 U. S. 365;
Cummings v. *Chicago*, 188 U. S. 410;
Manigault v. *Springs*, 199 U. S. 473.

(c) Regulate wharfage charges and exact tolls for the use of artificial facilities provided under this authority (although payment is required from those engaged in interstate or foreign commerce)—

Keokuk Packet Company v. *Keokuk*, 95 U. S. 80;
Cincinnati, etc. Packet Company v. *Catlettsburg*, 105 U. S. 559;
Parkersburg and O. R. Transportation Co. v. *Parkersburg*, 107 U. S. 691;
Huse v. *Glover*, 119 U. S. 543;
Ouachita Packet Company v. *Aiken*, 121 U. S. 444;
Sands v. *Manistee River Improvement Co.*, 123 U. S. 288, 295.

(d) Make quarantine regulations—

Morgan's Steamship Co. v. *Louisiana Board of Health*, 118 U. S. 455;
Missouri, Kansas & Texas Railway Co. v. *Haber*, 169 U. S. 613;

Louisiana v. *Texas*, 176 U. S. 1;
Rasmussen v. *Idaho*, 181 U. S. 198;
Compagnie Francaise v. *Louisiana Board of Health*, 186 U. S. 380;
Reid v. *Colorado*, 187 U. S. 137;
Asbell v. *Kansas*, 209 U. S. 251.

(e) Make state inspection laws—

Gibbons v. *Ogden*, 9 Wheat. 1, 203;
Turner v. *Maryland*, 107 U. S. 38;
Plumbley v. *Massachusetts*, 155 U. S. 461;
Patapsco Guano Co. v. *North Carolina*, 171 U. S. 345;
Savage v. *Jones*, 225 U. S. 501;
Foote v. *Maryland*, 232 U. S. 494.

(f) Safeguard life and property, even though engaged in interstate commerce—

Smith v. *Alabama*, 124 U. S. 465;
Hennington v. *Georgia*, 163 U. S. 299;
New York, New Haven & Hartford R. R. Co. v. *New York*, 165 U. S. 628;
Lake Shore & M. S. R. Co. v. *Ohio*, 173 U. S. 285;
Missouri Pacific R. Co. v. *Larabee Mills*, 211 U. S. 612;
Missouri Pacific R. Co. v. *Kansas*, 216 U. S. 262;
Atlantic Coast Line R. R. Co. v. *State of Georgia*, 234 U. S. 280.

Without pausing to cite other cases which were decided on the same principle, we shall pass on to draw attention to the fact that those cases in which this Court has held that a state statute affecting interstate commerce was void may also all be explained on the same fundamental test which this Court has established.

The more important of these cases are the cases holding that a state has no power to establish the rates to be charged by railroads for interstate transportation. The most prominent of these cases are *Wabash, etc. R. Co.* v. *Illinois,* 118 U. S. 557; *Hanley* v. *Kansas etc. R. Co.,* 187 U. S. 617; and *Railroad Commission* v. *Worthington,* 225 U. S. 101. This Court, in *Port Richmond and Bergen Point Ferry Co.* v. *Board of Chosen Freeholders, supra,* specifically states that the basic, fundamental principle which the Court established in that case governed the decision in these cases. At page 331, this Court said:

> "It was this principle which governed the decision in *Wabash, St. L. & P. R. Co.* v. *Illinois,* 118 U. S. 557, as to interstate railroad rates. Considering the conditions of interstate railroad transportation, which might be extended not only from one state to another, but through a series of states, or across the continent, and the consequences which would ensue if each state should undertake to fix rates for such portions of continuous interstate hauls as might be within its territory, the conclusion was reached that 'this species of regulation' was one 'which must be, if established at all, of a general and national character', and could not be 'safely and wisely remitted to local rules'."

The same principle which applies to a case of interstate railroad rates of course applies to a case of interstate telegraph rates. *Western Union Telegraph Company* v. *Pendleton,* 122 U. S. 347; *Western Union Telegraph Company* v. *Brown,* 234 U. S. 542.

And the same principle naturally applies to any act

of a state in seeking to make its consent a condition to entering upon interstate railroad or telegraph commerce or to levy a tax upon this commerce as such.

Gloucester Ferry Co. v. *Pennsylvania,* 114 U. S. 196; *Robbins* v. *Taxing District,* 120 U. S. 489; *Philadelphia & S. Mail S. S. Co.* v. *Pennsyvania,* 122 U. S. 326; *Crutcher* v. *Kentucky,* 141 U. S. 47; and particularly *Sault Ste. Marie* v. *International Transit Co.,* 234 U. S. 333, in which case all the more important preceding cases to this effect are cited.

We assume that in view of the recent important decisions of this Court hereinbefore referred to, it will not be necessary to devote any further attention to this point.

5. *If the Matter is of Local Concern, and the Federal Government has not Acted, the States may Establish Rates in Certain Cases of Commerce among the States or with Foreign Nations.*

The Transportation Company strenuously contends that whatever else the states may do affecting interstate or foreign commerce, they, under no circumstances, have the right to establish a rate for either interstate or foreign transportation. The Transportation Company, in making this claim, relies on the authorities which were all considered by this Court in the *Minnesota Rate* case, *supra,* and in the *Port Richmond and Bergen Point Ferry Company* case, *supra.* The difficulty with the Transportation Company's contention is that it insists on a universal appli-

cation of the decisions of this Court with reference to interstate *railroad* transportation, which decisions were shown by this Court in the *Port Richmond and Bergen Point Ferry Company* case, *supra,* to rest on the basic principle therein reiterated, and to be of no controlling effect in the case of *local water transportation.* The Transportation Company commits the error of applying to *all* cases of interstate and foreign commerce the decisions of this Court in *one class* of those cases, viz., the railroad transportation cases, without bearing in mind that the conditions with reference to other classes of interstate and foreign commerce may, on the facts of a given case, be such as to show that the commerce is essentially local and that under the application of the fundamental test, the state should have the right to regulate the transportation rate until the Federal Government acts.

As early as 1885, Mr. Justice Field, in *Gloucester Ferry Company* v. *Pennsylvania,* 114 U. S. 196, directly held that reasonable charges for the use of property, either on water or on land, are not an interference with the freedom of transportation between the states secured under the commercial power of Congress. The question in that case was whether the State of Pennsylvania could impose a tax upon the Gloucester Ferry Company, a New Jersey corporation, based upon its capital stock. The Court held that the State of Pennsylvania had no right to take such action.

Referring to the acts which the state could do with reference to this ferry, this Court, at page 217, said:

> "Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the states bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the states of taxes or burdens upon commerce between them."

Addressing itself directly to the question of the charges for such service, this Court then continued as follows:

> "Freedom from such impositions does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. *Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the states secured under the commercial power of Congress.*"

Consequently, if in any given case a state's action in establishing a reasonable rate for transportation among the states or with foreign nations is to be held void, it will not be for the reason that the establishment of a reasonable rate necessarily unlawfully burdens commerce, but that on the facts of the case the state acted in a matter which is of national concern and requires uniformity of regulation.

In *Covington and Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, this Court held void a statute of Kentucky which undertook to establish the fare to be charged in both directions over a bridge between Kentucky and Ohio. This Court, in reaching this decision, carefully points out, on page 220, that

the State of Kentucky "by the statute in question, at- "tempts to reach out and secure for itself a right to "prescribe a rate of toll applicable *not only to per- "sons crossing from Kentucky to Ohio, but from "Ohio to Kentucky, a right which practically nulli- "fies the corresponding right of Ohio to fix tolls for "her own state".* At the same time, this Court, on page 222, affirms the statement of *Gloucester Ferry Company* v. *Pennsylvania, supra,* that the establishment of reasonable rates is not the imposition of a burden upon interstate commerce. On the same page this Court specifically leaves open the question whether, in the absence of legislation by Congress, "the states may by reciprocal action fix upon a tariff "which shall be operative upon both sides of the "river". Of course, if a state has no right in any event to establish a rate for an interstate transportation, this Court would at once have closed the matter and have decided that the states could not, even by agreement, act in a matter which had been left exclusively in the hands of the Federal Government.

In the same case Justices Fuller, Field, Gray and White, while concurring in the judgment of reversal, specifically held, on page 223, that as Congress has made no provision as to tolls, the Federal Government has "thereby manifested the intention of Con- "gress that the rates of toll should be as established "by the two states", thereby specifically admitting the right of the states to establish the rates for the interstate transportation by means of this bridge, if

the states had not foreclosed themselves by their contract with the bridge corporation.

Whatever doubt may possibly have existed in this matter has been conclusively removed by this Court in the *Port Richmond and Bergen Point Ferry Company* case, *supra.* Without again explaining this case, we desire here simply to draw attention to the fact that this Court squarely decided that where the matter is primarily of local concern, the states have a right to establish the rates to be charged for interstate transportation by water across a boundary line between two states of this Union. Furthermore, this Court reiterated its position in the *Gloucester Ferry Company* case, *supra,* and *Covington and Cincinnati Bridge Company* case, *supra,* to the effect that the establishment of a reasonable rate is not necessarily a burden on commerce. And this Court decided, in accordance with the authorities, that the mere fact that the rate is for interstate transportation "would "not be deemed sufficient ground for invalidating "the local action, without considering the nature of "the regulation and the special subject to which it "relates". This decision, by giving the state authorities, in local matters, the right to prevent extortion and discrimination in the rates charged by transportation companies, in cases in which the Federal Government has not acted, is a fair and just decision and one to which we hope this Court will firmly adhere.

Finally, in *City of Sault Ste. Marie* v. *International Transit Company, supra,* which involved a ferry between Michigan and Canada navigating across the

St. Mary's river, this Court assumed, without any doubt or hesitancy,

> "that, by reason of the local conditions pertinent to the operation of ferries, there exists, in the absence of Federal action, a local protective power to prevent extortion in the rates charged for ferriage from the shore of the state and to prescribe reasonable regulations necessary to secure good order and convenience."

The significant point to which we desire to draw attention is the fact that this assumption was entertained by this Court with reference to commerce "with foreign nations". Here, finally, we have a case in which this Court, in applying the basic and fundamental principle which underlies all the decisions, declared that even as to commerce "with foreign nations", the case may be primarily one of local concern so that the state has the right, in the absence of Federal action, to establish the transportation rates.

6. *In the Present Case, because the Matter is of Local Concern, California has Jurisdiction to Establish the Rates Between San Pedro and Avalon, even if this be Considered Commerce with Foreign Nations.*

In the light of the decisions to which we have referred, we respectfully submit that the navigation of the Transportation Company's vessels between San Pedro and Catalina Island is a matter of local California concern. Even if this be regarded as commerce "with foreign nations", the State of California has the right to regulate the transportation rates,

at least until the Federal Government exercises its authority. As we pointed out in the opening sections of this brief, no other state and no other nation is in any way concerned with these rates of transportation. The Transportation Company's vessels move only from one California port to another California port in the same county, by the most direct line, and traverse the high seas solely for the purpose of conducting transportation between the two California termini. We submit that this is not a national matter, requiring a uniform rule, but a local matter which can well be handled by the State of California. We desire to draw attention, also, to the fact that by reason of the monopoly of the business enjoyed by the Transportation Company, the argument of this Court in the *Port Richmond and Bergen Point Ferry Company* case, *supra,* referring to the need for regulation by the state in order to prevent extortionate rates, applies with particular force to this case.

In the *Port Richmond and Bergen Point Ferry Company* case this Court held that the State of New Jersey had the right to regulate the rates for a vessel sailing from New Jersey to New York, another state of this Union. In the *Sault Ste. Marie* case, *supra,* this Court intimated that the State of Michigan would have the right to regulate the rates for transportation by vessel between Michigan and the province of Ontario, in Canada, a foreign country. Then, how much the more should the State of California have the right, in the absence of Federal legislation, to regulate the rates to be charged where no

other state is involved and no other nation is involved, but the case is simply one of local transportation between two California ports!

While we have thus argued the question of the power of the state, in the absence of Federal legislation, we do not wish to be understood as conceding that the decision of this point is necessary to the decision of this case. From the first we have consistently maintained that the commerce affected can by no reasonable use of the English language be held to be commerce "with foreign nations", and our belief in this conclusion is as strong today as it ever has been. Nevertheless, if this Court, in its wisdom, should decide that this is commerce "with foreign nations", we then confidently look to a decision holding that even though this be the case, this particular commerce is a matter of local concern which should be regulated, in so far as the rates of transportation are concerned, by the State of California until the Federal Government acts within this field.

We respectfully submit that the judgment of the Supreme Court of California should be affirmed.

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